
IN THE
United States Court of Appeals
FOR THE NINTH CIRCUIT

K-91, INC.,
Appellant,
v.

GERSHWIN PUBLISHING CORPORATION, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GUS J. SOLOMON, *Chief Judge*

APPELLEES' BRIEF

HOLMAN, MARION, PERKINS,
COIE & STONE
1900 Washington Building
Seattle, Washington 98101

J. PAUL COIE,
Of Counsel.

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
575 Madison Avenue
New York, New York 10022
Attorneys for Appellees

SIMON H. RIFKIND,
JAY H. TOPKIS,
ALLAN BLUMSTEIN,
Of Counsel.

October 11, 1965.

FILED

OCT 11 1965

FRANK H. SCHMID, CLERK

INDEX

	PAGE
Jurisdictional Statement	1
Statement of the Case	2
Introduction	2
The Decision Below	4
Statutes Involved	6
The Copyright Law	6
The Sherman Act	7
Washington Statute	7
The Facts	9
The Appellees and ASCAP	9
ASCAP's Relations with Its Members	10
ASCAP's Licensing Activity	12
ASCAP's Washington Licensing	14
1. The 1959 rate-fixing proceeding	15
2. Appellant's refusal to take a license	18
3. Other infringers	21
ASCAP's Compliance with Washington Law	22
Summary	23
Summary of Argument	24
I. The Affirmative Defenses Based on Washing- ton Law Are Without Merit	24
The Filing Requirements	25
Extortion and Terror	25

	PAGE
Issuing Blanket Licenses	26
Pooling Copyrights and Price Fixing	29
1. The Per Program License	30
2. Individual Licensing by ASCAP members	35
II. The Alleged Violations of Washington Law Con- stitute No Defense	37
III. The Affirmative Defenses Based On Federal Law Are Without Merit	44
Alden-Rochelle and Witmark	47
Appellant's "Conspiracy"	48
IV. In the Case At Bar, Enforcement Of The Copy- right Law Against Appellant Clearly Outweighs Enforcement Of The Antitrust Laws Against Appellees	50
Conclusion	51
Certificate of Compliance	53

CITATIONS

CASES:

<i>Alden-Rochelle, Inc. v. ASCAP</i> , 80 F. Supp. 888 (S. D. N. Y. 1948)	47
<i>Alfred Bell & Co. v. Catalda Fine Arts, Inc.</i> , 191 F. 2d 99 (2d Cir. 1951)	50
<i>Amalgamated Ass'n of Street Electric Railway & Motor Coach Employees v. Wisconsin Employ- ment Relations Board</i> , 340 U. S. 383 (1951) ...	42
<i>Automobile Workers Union v. O'Brien</i> , 339 U. S. 454 (1950)	42

<i>Hazeltine Research, Inc. v. Zenith Radio Corporation</i> , 239 F. Supp. 51 (N. D. Ill. 1965)	46
<i>Interstate Hotel Co. v. Remick Music Corp.</i> , 157 F. 2d 744 (8th Cir. 1946), <i>cert. denied</i> , 329 U. S. 809 (1947)	43
<i>Leo Feist, Inc. v. Demarie</i> , 16 F. Supp. 827 (W. D. La. 1935)	44
<i>Leo Feist, Inc. v. Young</i> , 138 F. 2d 972 (7th Cir. 1943)	37
<i>M. Witmark & Sons v. Jensen</i> , 80 F. Supp. 843 (D. Minn. 1948)	47
<i>Shenandoah Valley Broadcasting, Inc. v. ASCAP</i> , 331 F. 2d 117 (2d Cir. 1964), <i>cert. denied</i> , 377 U. S. 997 (1964)	47
<i>Sola Electric Co. v. Jefferson Electric Co.</i> , 317 U. S. 173 (1942)	41
<i>United States v. ASCAP</i> , Civil Action No. 13-95 (D. C. S. D. N. Y.)	10
<i>United States v. Loew's, Inc.</i> , 371 U. S. 38 (1962)	46
<i>United States v. Paramount Pictures, Inc.</i> , 334 U. S. 131 (1948)	46

CONSTITUTIONAL PROVISIONS:

United States Constitution, Article I, § 8	9
--	---

STATUTES:

15 U.S.C. § 1	7
17 U.S.C. § 1	2, 6, 49
17 U.S.C. § 101	2, 6
17 U.S.C. § 116	2, 7
28 U.S.C. § 1291	2
28 U.S.C. § 1337	2
28 U.S.C. § 1338	2

	PAGE
Chapter 19.24, R. C. W.	3, 23, 24, 36
§ 19.24.010	7
§ 19.24.020	8, 26, 27, 29, 35
§ 19.24.040	8, 25
§ 19.24.050	8, 25
§ 19.24.055	8, 25
§ 19.24.060	8, 25
§ 19.24.140	30

No. 20074

IN THE

United States Court of Appeals
FOR THE NINTH CIRCUIT

K-91, INC.,
Appellant,
v.

GERSHWIN PUBLISHING CORPORATION, ET AL.,
Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE WESTERN DISTRICT OF WASHINGTON,
NORTHERN DIVISION

HONORABLE GUS J. SOLOMON, *Chief Judge*

APPELLEES' BRIEF

Jurisdictional Statement

This is an action for copyright infringement which appellees commenced in the United States District Court for the Western District of Washington, Northern Division (R. 1).^{*} Appellees are the copyright proprietors of

^{*}"R." refers to documents in the record on appeal as listed in appellant's designation of the record on appeal and appellees' counter-designation. "Tr." refers to pages in the trial transcript. "P. Ex." refers to plaintiffs' (appellees') exhibits. "D. Ex." refers to defendant's (appellant's) exhibits.

Judge Solomon's opinion and his findings of fact and conclusions of law are set forth in Appendix A to our brief. "App. A" refers to pages of said appendix.

four musical compositions. By this action, they sought to enforce their rights under the copyright laws of the United States—to recover damages for infringement of their copyrighted works and to enjoin further infringements, 17 U. S. C. §§ 1, 101, 116 (R. 1).

The trial court had jurisdiction over appellees' claims pursuant to 28 U. S. C. § 1338.

Appellant is the owner and operator of radio station KIXI in Seattle, Washington. Appellant's answer in the court below asserted defenses and a counterclaim under the federal antitrust laws (R. 4). The trial court had jurisdiction over appellant's counterclaim pursuant to 28 U. S. C. § 1337.

Appellant now appeals from a final judgment rendered by the trial court (Solomon, J.) granting appellees the relief they sought (R. 11). This Court has jurisdiction of the appeal by virtue of 28 U. S. C. §1291.

Statement of the Case

Introduction

Appellant's statement of the facts contains many errors and large amounts of irrelevant material. It becomes necessary, therefore, to state the relevant facts, as stipulated by the parties before trial (R. 30) and as found by the trial court based on the testimony and exhibits introduced at the trial (R. 37).

To begin, it is important to place in its proper perspective appellant's conduct which gave rise to this lawsuit. Appellant admits that it performed appellees' copyrighted musical compositions on its radio station (R. 30, Fact 5). Appellant admits also that the performances were public and for profit, and were made without payment of any royalty and without the consent of appellees (R. 30, Fact 6). Indeed, the trial court found that appellant has

regularly broadcast the musical compositions of appellees and of other authors, composers and publishers over its radio station, for profit, without the consent of the copyright owner or any licensing agency and without the payment of any royalty or compensation of any kind to any person (App. A, p. 9, Fact 8).

This was done, the trial court found, "pursuant to deliberate policy, long persisted in, and without any regard to the rights of plaintiffs and other copyright proprietors under the federal copyright law" (App. A, p. 9, Fact 9). Nor could appellant plead ignorance of the clear requirement of law that it pay for the use of copyrighted music; its station was managed by persons of considerable experience and wide knowledge of radio broadcasting (App. A, p. 9, Fact 9, Tr. 3).

These facts permit no conclusion but that appellant was a deliberate and wilful infringer. The Court below so found (App. A, pp. 2-6, 9, Fact 9), and its finding is not here challenged.

Accordingly, all that remains for consideration on this appeal is the sufficiency of the affirmative defenses urged by appellant as justification for its appropriation of appellees' property. These defenses, however denominated, boil down to two:

1. Appellant contends that appellees, together with the American Society of Composers, Authors and Publishers (ASCAP), an unincorporated membership association to which each appellee belongs, have violated a state statute, Chapter 19.24, Revised Code of Washington, the so-called Copyright Protection Law, and are therefore barred from maintaining this action;

2. Appellant contends that appellees, together with ASCAP, have violated the federal antitrust laws in the

use of their copyrights and are therefore barred from maintaining this action.

At the trial of this action, it was abundantly demonstrated that there was no merit in appellant's affirmative defenses—neither factually nor legally.

The District Court so held. There is no reason in law or in the facts here of record for this Court to disturb the result reached below.

The Decision Below

This action was consolidated for trial together with five other infringement actions commenced by appellees and other copyright proprietors against two other radio broadcasting corporations in Washington and the president and principal stockholder of one of them. The actions were tried before the Honorable Gus J. Solomon, Chief Judge of the United States District Court for the District of Oregon, sitting in these cases pursuant to designation by the district court judges in Washington.

After studying the statement of admitted facts, the evidence adduced at the trial, the exhibits and the memoranda of authorities submitted by the parties, the Court below concluded that appellees and the other plaintiffs below were entitled to prevail (App. A, pp. 2-6).*

As we have seen, Judge Solomon began by finding wilful and intentional infringement: the defendant broadcasters had deliberately and knowingly appropriated the property of appellees and thousands of other copyright proprietors.

With regard to appellant's affirmative defenses founded on Washington law, Judge Solomon wrote (App. A, p. 4):

*No appeals were taken in the other five actions.

“I find that plaintiffs have complied with the statutory requirements of the State of Washington. Defendants have failed to prove that ASCAP’s registration of the songs in its repertory was inadequate or that plaintiffs or ASCAP violated the Washington law relating to the pooling of copyright interests without providing for per piece licensing (RCWA 19.24.020); or that the filing of these and other actions by the plaintiffs to enforce their rights under the copyright laws constituted an abuse of either State or Federal process. There is no evidence of any abusive practices by either the plaintiffs or their licensing agent which would deny them copyright protection.”

Judge Solomon also concluded that (App. A, p. 5):

“To construe the provisions of the Washington statute (RCWA, Chapter 19.24) so as to make the acts of the plaintiffs or ASCAP in this case unlawful would raise grave questions concerning the constitutionality of the Washington statute under the Fourteenth Amendment to the Constitution of the United States.”

With regard to appellees’ alleged violations of the federal antitrust laws, Judge Solomon concluded that (App. A, p. 5):

“Plaintiffs have not unlawfully extended their copyright monopolies through a combination among themselves or with ASCAP, nor are they guilty of violating the federal antitrust laws in any respect alleged by the defendants.”

Although Judge Solomon found that appellant had deliberately appropriated appellees’ property and had greatly

profited by its wrongful conduct, he fixed damages against appellant at the statutory minimum of \$250 per infringement (App. A, p. 33, Conclusion 20).

Judge Solomon found also that plaintiffs below were entitled to reasonable attorneys' fees in the amount of \$15,000, to be allocated among the six cases tried in accordance with the amount of statutory damages allowed in each case (App. A, p. 33, Conclusion 21). Accordingly, judgment was entered in this action for \$1,000, plus attorneys' fees in the amount of \$252.31 (R. 11).

Statutes Involved

The Copyright Law

Section 1 of the Copyright Law, 17 U. S. C. § 1, provides in pertinent part:

“§ 1. Exclusive rights as to copyrighted works

Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:

* * *

(e) To perform the copyrighted work publicly for profit if it be a musical composition; . . .”

Section 101 of the Copyright Law, 17 U. S. C. § 101, provides in pertinent part:

“§ 101. Infringement

If any person shall infringe the copyright in any work protected under the copyright laws of the United States such person shall be liable:

(a) Injunction.—To an injunction restraining such infringement;

(b) Damages and profits; amount; other remedies.—To pay to the copyright proprietor such

damages as the copyright proprietor may have suffered due to the infringement, * * * or in lieu of actual damages and profits, such damages as to the court shall appear to be just, and in assessing such damages the court may, in its discretion, allow the amounts as hereinafter stated, * * * and such damages shall in no . . . case exceed the sum of \$5,000 nor be less than the sum of \$250, and shall not be regarded as a penalty.”

Section 116 of the Copyright Law, 17 U. S. C. § 116, provides:

“§ 116. Costs; attorney’s fees

In all actions, suits, or proceedings under this title, except when brought by or against the United States or any officer thereof, full costs shall be allowed, and the court may award to the prevailing party a reasonable attorney’s fee as part of the costs.”

The Sherman Act

Section 1 of the Sherman Act, 15 U. S. C. § 1, provides in pertinent part:

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .”

Washington Statute*

Section 19.24.010, R. C. W., provides that it shall be unlawful for any person to cause to be publicly performed

*The complete text of the pertinent Washington statute is set out in Appendix B to our brief.

for profit any musical work copyrighted under the laws of the United States without the consent of the owner. (Appellant has, as we have seen, pursued a policy of constant violation of this statute.)

Section 19.24.020, R. C. W., provides that two or more copyright proprietors may not "pool their interests for the purpose of fixing the prices on the use" of their copyrighted works or for the purpose of collecting fees or issuing "blanket" licenses for the right to perform their works publicly. The statute contains an exception: "*Provided, however,* such persons may join together if they issue licenses on rates assessed on a per piece system of usage."

Sections 19.24.040, and 19.24.050 and 19.24.055, R. C. W., provide that two or more copyright proprietors who join together are required annually to file in the office of the Secretary of State of Washington "a complete catalogue of the titles of their claimed compositions" together with a "list of the prices charged" for their works.

Section 19.24.060, R. C. W., declares that the provisions of Chapter 19.24, R. C. W., "shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with the copyright laws of the United States . . . [and] shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state . . . by any individual, corporation, or organizations who attempt to use the Federal courts as innocent instrumentalities in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and Federal process."

The Facts

The record here discloses the following:

The Appellees and ASCAP

Appellees and the other plaintiffs below—among them Richard Rodgers, Irving Berlin and the late Cole Porter—include some of the most talented and successful writers of popular music in the United States today.

The right of a copyright proprietor to be rewarded for public performances for profit of his musical compositions is a valuable and important right—not only to the copyright proprietor but, more importantly, to the public as a whole. For without the incentives which flow to copyright proprietors from the rights granted to them in the Copyright Law, the seemingly endless variety of melodies and lyrics which result from the creative efforts of composers and lyricists would soon stop. The framers of the Constitution recognized the public value of so encouraging creativity. The Copyright Clause empowers the Congress "To promote the Progress of . . . useful Arts by securing for limited Times to Authors . . . the exclusive Right to their respective Writings . . ." U. S. Const., Art. I, § 8.

Appellees are all members of ASCAP, an unincorporated membership association which is organized under the laws of the State of New York and has over 8,800 author, composer and publisher members who own copyrights in separate musical compositions (R. 30, Facts 10, 11).

Before the organization of ASCAP, there was no effective method by which individual writers and publishers of music could secure payment for the use of their copyrighted musical works in public performances for profit. The users of music were so numerous and widespread, and each instance of use so fleeting, that no individual writer or

publisher could take the measures necessary to negotiate licenses with them or to detect unauthorized uses and secure legal redress. Conversely, music users who wished to perform thousands of works each year without risk of infringement had no practical means of obtaining licenses from the owners of all those works.

As a means of solving the problems of both the copyright owners and the users of music, ASCAP was organized in 1914 as an unincorporated membership association representing both writers and publishers.

ASCAP's Relations with Its Members*

The relationship between ASCAP and its members is subject to both internal and external regulation. Internally, ASCAP and its members are governed by the ASCAP Articles of Association and by agreements executed by each member and by the Society, the "General Agreement" (D. Ex. A-5), and the "Television Agreement" (P. Ex. 10). But these internal arrangements are subordinate to, and in large measure superseded by, the extensive regulatory provisions of the Amended Final Judgment of March 14, 1950 (D. Ex. A-2), entered on consent in an antitrust action entitled *United States v. ASCAP*, Civil Action No. 13-95 (D. C. S. D. N. Y.), and the Order of January 7, 1960

*Appellant's brief at numerous places purports to comment on ASCAP's history, its past licensing practices and other matters. These comments are usually as inaccurate as they are irrelevant. For example, appellant's brief (p. 15) states that "because of continuing dissatisfaction among ASCAP's own members John C. McGeehan by order of the court having jurisdiction of the consent decree is examining the design and conduct of ASCAP's method of surveying performances." No citation to the record before this Court is offered—doubtless because there could be none, appellant having said nothing on the subject at the trial. Hence the statement here is irrelevant. It is equally untrue.

It would be pointless on this appeal to correct the numerous factual errors contained in appellant's brief. But by our failure to correct appellant's mis-statements, we do not mean to acquiesce in them.

(D. Ex. A-3), entered in the same action. The Amended Final Judgment and the Order are the decrees now in effect; they superseded an earlier judgment, entered on consent in 1941.

Pursuant to the terms and conditions of these various documents read together,* each member of ASCAP, including appellees, has granted to ASCAP only the *non-exclusive* right to license non-dramatic public performances for profit of all the compositions written, composed or published by such member during the term of his membership in ASCAP, and has received the right to share in the royalty distributions made by the Society.

Thus, appellant's assertion on p. 6 of its brief that each member of ASCAP assigns to ASCAP all his non-dramatic performing rights of his copyrighted musical compositions is simply not so: As we have just seen, each member of ASCAP remains absolutely free to license public performances of his musical compositions. And a would-be licensee is free to deal either with the individual copyright proprietor or with ASCAP.

*The Court will note that in major respects the General Agreement and the Television Agreement are modified by the Amended Final Judgment of 1950. For example, the General Agreement (which was for the term 1941-1965 and was drawn up in 1940) provides on its face that the member "sells, assigns, transfers and sets over unto the Society . . . the right of public performance . . . in each musical work" of which the member is the copyright proprietor (D. Ex. A-5). But each copy of the General Agreement has had stamped upon its face language indicating that it is modified by and subject to the Amended Final Judgment. This latter document enjoins ASCAP from "Holding, acquiring, licensing, enforcing or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis" (D. Ex. A-2, Sec. IV[A]). The Amended Final Judgment defines "right of public performance" as meaning "the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner" (D. Ex. A-2, Sec. II[B]). Hence, as a result of the Amended Final Judgment, ASCAP receives under the General Agreement only a non-exclusive right to license non-dramatic public performances for profit.

(Appellant's brief at several points (pp. 8,85) purports to discuss ASCAP's system for making royalty distributions to its members. Appellant's discussion is misleading and erroneous. And, of course, ASCAP's system of royalty distribution is wholly irrelevant to any issue in this case. The fact is, however, that the ASCAP royalty distribution system is regulated by the provisions of the Amended Final Judgment and the Order of January 7, 1960. In essence, royalty distributions are keyed to and are dependent upon an objective survey of the music actually played by radio and television broadcasters and other users. The ASCAP survey is supervised by the District Court in New York. Good music does not, as appellant suggests, subsidize bad music. To the contrary, the copyright proprietors of all music are rewarded commensurate with the popularity of their music as revealed by the objective survey.)

ASCAP's Licensing Activity

ASCAP licenses many thousands of users of music throughout the United States, ranging from the three national television networks to the local tavern which employs musicians for Saturday nights.

Most users want—and receive—the right to perform as often as they wish any of the more than one million musical compositions in ASCAP's repertory. One of the defendants below, for example, broadcasts 60,000 playings of musical compositions per year (App. A, p. 10, Fact 12).

Thus it may fairly be said that ASCAP performs a virtually indispensable service both for its members and for the users of the members' music. The court below found (App. A, p. 12, Fact 25):

“The licensing of public performances for profit of copyrighted musical compositions by licensing organizations such as ASCAP is the only practical

way by which copyright proprietors may exercise their federally-granted right to license non-dramatic performances of their copyrighted compositions. No single copyright proprietor could deal individually with all would-be users of his copyrighted compositions, and it would be impossible for him to police the use of his copyrighted songs. Equally, most broadcasters and other users of copyrighted music could not deal separately with the thousands of copyright proprietors whose music they perform.”

ASCAP’s licensing activity is regulated and controlled in virtually every detail by the Amended Final Judgment of March 14, 1950 (D. Ex. A-2).*

The central theme of the Amended Final Judgment is that it guarantees any user the right to perform ASCAP music and guarantees further that he will pay no more than a fair license fee.

Under Section IX of the Amended Final Judgment, when any would-be user of some or all of the compositions in the ASCAP repertory applies to ASCAP for a license, ASCAP is required to advise him of the fee which it deems reasonable for the license requested. The making of the application operates automatically to license the applicant. If the parties are unable to agree upon a reasonable fee, the applicant may apply to the United States District Court for the Southern District of New York for determination of a reasonable fee. In any such proceeding, the burden is on ASCAP to establish the reasonableness of the fee which it has requested.

Once a reasonable fee has been finally determined by the Court, ASCAP is required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP (D. Ex. A-2,

*The Amended Final Judgment of 1950 is set out in Appendix C to our brief.

Sec. IX[C]). And even without a Court order fixing a fair rate, ASCAP is forbidden at all times to discriminate "in license fees or other terms and conditions between licensees similarly situated" (D. Ex. A-2, Sec. IV [C]).

Thus, any would-be user of any part of ASCAP's repertory, including appellant, is guaranteed that he *can* use that music and that he will pay no more than a fair license fee. For he has an absolute right to be free of discrimination; he is assured of equal treatment.

And if a would-be user for any reason desires not to deal with ASCAP, he is free to negotiate individual licenses with individual copyright proprietors. For under the Amended Final Judgment, as we have seen, each individual member of ASCAP retains the right to license public performances for profit of his musical compositions, and ASCAP is forbidden to license individual compositions except upon specific written request of both the member and the user (D. Ex. A-2, Sec. VI).

Would-be users of ASCAP music have made extensive use of the provisions of Section IX of the Amended Final Judgment. In the past, whenever existing ASCAP licenses with radio or television broadcasters were about to expire, the broadcasters have joined together in industry-wide committees for the purpose of negotiating new terms with ASCAP (App. A, p. 14, Fact 30). On occasion, negotiations have been unsuccessful and the broadcasters have exercised the rights conferred by Section IX and commenced court proceedings for determination of a reasonable license fee (App. A, p. 14, Fact 30).

ASCAP's Washington Licensing

The Amended Final Judgment of course controls ASCAP's licensing activity with respect to broadcasting

of music in the State of Washington, just as it controls in the other forty-nine states—and broadcasters in the State of Washington, like broadcasters in the rest of the United States, have exercised the rights conferred by Section IX. Indeed, the only licenses ASCAP now issues to broadcasters in the State of Washington were the product of a recent Section IX proceeding. Accordingly, it is pertinent briefly to review that proceeding:

1. *The 1959 rate-fixing proceeding.* In the years before 1959, some Washington broadcasters refused to enter into license agreements with ASCAP; nor did they seek individual licenses from composers or publishers. This was, of course, their right. No broadcaster has any obligation to broadcast copyrighted music. If he broadcasts no copyrighted material, he needs no license. But these broadcasters wanted it both ways; they regularly broadcast copyrighted music and paid nothing to any copyright owner.

Other broadcasters, perhaps mindful of their obligations under federal law or basic principles of fairness, obtained licenses, paid license fees and so did not infringe.

In 1958, some of the broadcasters who had entered into agreements with ASCAP stopped paying fees on the alleged ground that payment would violate Ch. 19.24, R. C. W. (App. A, p. 21, Tr. 341).

ASCAP's agreements with broadcasters throughout the United States expired on December 31, 1958 (App. A, p. 21, Fact 39, Tr. 341). Early in 1959, a group of broadcasters from all over the country commenced a proceeding in the United States District Court for the Southern District of New York under Section IX of the Amended Final Judgment for determination of reasonable fees for licenses, effective as of January 1, 1959 (App. A, p. 21, Tr. 341). Included among the petitioning broadcasters were

eleven broadcasters located in the State of Washington (App. A, p. 21, Tr. 341).

In that proceeding, the Court ruled that, in the circumstances presented, ASCAP would not be required to issue licenses to any petitioning broadcaster in the State of Washington (App. A, p. 21, Tr. 341-342). Thereafter and until November 20, 1959, ASCAP did not offer licenses to Washington broadcasters (App. A, p. 21, Tr. 342).

In the interim, negotiations were had by ASCAP's general counsel, Herman Finkelstein, and Ronald A. Murphy, Esq., president and counsel of the Washington State Association of Broadcasters. (Mr. Murphy, is, of course, counsel to appellant in this case.)* And, on November 20, 1959, Mr. Murphy filed a petition in the United States District Court for the Southern District of New York on behalf of the owners of 61 Washington radio and 7 television stations (P. Ex. 11). The petitioners asked the Court to issue an order (P. Ex. 11)**

“(a) directing ASCAP to grant to petitioners and others similarly situated who may join herein, licenses for the right of public performance of compositions in the ASCAP repertory by the radio and television stations operated by them within the State of Washington;

“(b) determining and establishing the terms and conditions of such licenses.”

At the request and consent of the petitioners, the Court (Ryan, C. J.) entered an order, on November 20, 1959, di-

*It should be noted that in 1959, Mr. Murphy, on behalf of his then clients, consented to the entry of an order which found that ASCAP licenses with Washington broadcasters were lawful under Ch. 19.24 R. C. W. Now, on behalf of another client, he takes the position here that any broadcaster who signed such a license committed a criminal act punishable under Washington law.

**The petition is set out in Appendix D to our brief.

recting ASCAP to issue licenses to the petitioners in one of two specified forms for the period January 1, 1959 through December 31, 1963 (P. Ex. 12). Judge Ryan found (P. Ex. 12):*

“6. Taking into consideration the provisions of the Amended Final Judgment herein, the regulation of the activities of the respondent thereunder and the scope of its activities pursuant thereto, and giving due regard to the enactment of Revised Code of Washington, C. 19.24—Laws of 1937, C. 218, the licenses which the Society is hereby directed to issue may lawfully be entered into between respondent and petitioners, and respondent is hereby directed to enter into such license agreements with each of the petitioners.

“7. The provisions in said agreements for the disposition of claims for the period prior to June 1, 1959 are reasonable and do not discriminate against other users in the State of Washington or other states.”

The two specified license forms were the so-called “blanket” and “per program” licenses (App. A, p. 22, Fact 45). In broad terms, both licenses grant the licensee the right to perform whatever ASCAP music he desires, whenever he desires. Under the blanket license, the fee charged is 2.125 % of the licensee’s over-all revenues from sale of time on the air, after certain deductions (App. A, p. 22, Fact 45). Under the per program license, the licensee pays a higher percentage, but the fee is based only on the revenues from programs on which compositions in the ASCAP repertory are performed (App. A, p. 22, Fact 45).

*Judge Ryan’s order is set out in Appendix E to our brief.

2. *Appellant's refusal to take a license.* Although appellant was not a petitioner in the 1959 rate-fixing proceeding, it knew what was going on (R. 30, Fact 75, App. A, p. 23, Fact 46).^{*} From time to time during the negotiations

^{*}The petitioners in the 1959 rate-fixing proceeding were:

KBKW INC.	(KBKW)
KXRO INC.	(KXRO)
AUBURN BROADCASTERS INC.	(KASY)
BELLEVUE BROADCASTERS	(KFKF)
KPUG INC.	(KPUG)
BREMERTON BROADCASTING Co.	(KBRO)
CENTRAL BROADCASTING CORP.	(KELA)
KITI CORP.	(KITI)
LAKE CHELAN BROADCASTING CORP.	(KOZI)
ADRIAN DEVRIES	(KCLX)
COLVILLE BROADCASTING Co.	(KCVL)
WESTERN BROADCASTERS INC.	(KXLE)
COULEE BROADCASTING CORP.	(KULE)
WALTER N. NELSKOG	(KQTY)
EVERETT BROADCASTING Co.	(KRKO)
RALPH A. NACHTMANN	(KFDR)
JAMES D. HIGSON	(KLOG)
KEPR INC.	(KEPR)
FERGUSON & HALL	(KFHA)
TRIAD BROADCASTING CORP.	(KEDO)
KSEM INC.	(KSEM)
CENTRAL BASIN BROADCASTING CORP.	(KWIQ)
BECKLEY RADIO Co.	(KBRC)
TOM OLSEN	(KGY)
KITN CORP.	(KITN)
KOMW INC.	(KOMW)
KZUN INC.	(KZUN)
OTHELLO RADIO	(KRSC)
KORD INC.	(KORD)
KPKW RADIO	(KPKW)
RADIO PACIFIC INC.	(KONP)
PROSSER-GRANDVIEW BROADCASTERS INC. ...	(KARY)
KOFE INC.	(KOFE)
WASH. STATE UNIVERSITY	(KWSC)
QUINCY VALLEY BROADCASTERS	(KPOR)
WILLAPA BROADCASTING Co.	(KAPA)
D & D BROADCASTING CORP.	(KALE)
WASH. TELECASTERS INC.	(KAYO)
KING BROADCASTING Co.	(KING)

(Footnote Continued on following page)

between ASCAP and petitioners, and subsequent to November 20, 1959, Mr. Murphy, counsel for the petitioners, advised all Washington broadcasters of the opportunities provided by Judge Ryan's order (P. Ex. 13).

Appellant decided not to take advantage of the licenses made available under Judge Ryan's order (R. 30, Facts 76, 77, App. A, p. 23, Facts 47, 48). It preferred to continue to infringe.

The present action was brought to recover damages for four acts of infringement and to obtain injunctive relief against further use by appellant of appellees' property.

Appellant seeks to justify its refusal to take a license from ASCAP on the ground that it was apprehensive

QUEEN CITY BROADCASTING Co.	(KIRO)
SEATTLE BROADCASTING Co.	(KOL)
FISHER'S BLEND STATION INC.	(KOMO)
KTIX INC.	(KTIX)
GOLDEN WEST BROADCASTERS	(KVI)
KXA INC.	(KXA)
KHQ INC.	(KHQ)
KLYK INC.	(KLYK)
NORTHERN PACIFIC RADIO CORP.	(KXLY)
COLE E. WYLIE	(KREW)
TACOMA RADIO CORP.	(KMO)
TACOMA BROADCASTERS INC.	(KTAC)
TRIBUNE PUBLISHING Co.	(KTNT)
RADIO BROADCASTERS INC.	(KENE)
LEADER BROADCASTING Co.	(KHIT)
WALLA WALLA BROADCASTING Co.	(KTEL)
FRONTIER BROADCASTING Co.	(KMEL)
KUEN BROADCASTING Co.	(KUEN)
CASCADE BROADCASTING Co.	(KIMA)
KIT INC.	(KIT)
YAKIMA BROADCASTING CORP.	(KLOQ)
KREM BROADCASTING Co.	(KREM)
BASIN TV Co.	(KBAS-TV)
CASCADE BROADCASTING Co.	(KEPR-TV)
KHQ INC.	(KHQ-TV)
KREM BROADCASTING Co.	(KREM-TV)
NORTHERN PACIFIC TELEVISION CORP.	(KXLY-TV)
J. ELROY McCAW	(KTVW)
CASCADE BROADCASTING Co.	(KIMA-TV)

of criminal prosecution under Washington law and because it had been advised by counsel and was of the "firm belief" that ASCAP and its members were misusing their copy-rights in violation of federal law.

Judge Solomon, who heard and saw the witnesses offered by defendants below, made this finding of fact (App. A, p. 26, Fact 66):

"Defendants' failure to take licenses from ASCAP was not because they feared prosecution under Chapter 19.24, R. C. W. Defendants failed to take licenses only because they wanted to avoid paying license fees on the same basis charged to—and paid by—other broadcasting companies."

The evidence fully supports Judge Solomon's finding. First, so far as fear of prosecution is concerned, no representative of appellant testified to any such fear. Indeed, no representative of appellant testified on any subject. And the testimony at the trial was all to the effect that none of the defendants below, nor any officer of any defendant corporation, had ever been threatened with prosecution under Ch. 19.24, R. C. W., from 1937 when the statute was first passed to the date of the trial (Tr. 182, 202, 252, 300). None of the defendants' witnesses had ever heard of any broadcaster who had been so threatened (Tr. 182, 202, 251-252, 300-303). These facts are particularly significant in light of the testimony at the trial that most Washington broadcasters have taken licenses from ASCAP and other licensing organizations and have publicly participated in judicial proceedings to obtain such licenses (Tr. 341-342). In short, the inference is inevitable that the public authorities of the State of Washington have been fully aware of the relations between Washington broadcasters and ASCAP and other licensing organizations and have

deliberately decided that ASCAP's activities require no correction.*

Appellant's claim with regard to its "firm belief" that ASCAP and its members were misusing their copyrights in violation of federal law is equally without merit. First, there is no testimony in the record here with regard to appellant's state of mind—as we noted above, no representative of appellant testified at the trial. Appellant's "firm belief" is thus a manifest afterthought. Second, even to the extent that there is any evidence in this record that any defendant below refused to take an ASCAP license because it believed ASCAP was violating federal law, that evidence is highly questionable and unworthy of belief. Defendant Rogan Jones, president of defendant International Good Music, Inc., admitted on the witness stand that he had taken ASCAP licenses for radio stations with which he was connected in states other than Washington and that he would not regard ASCAP's alleged violation of federal law as justification for his infringement (Tr. 299-300).

3. *Other infringers.* Appellant and the other defendants below were not the only infringers in the State of Washington. Other stations—including some which had been petitioners before Judge Ryan—also decided to infringe rather than pay the license fees which Judge Ryan had found to be fair and reasonable.

*Since appellant has departed from the record to assert its fear of prosecution under Washington law, perhaps we may similarly depart to negate this claim of fear: After the judgments below were entered, appellant executed and tendered to ASCAP a retroactive license agreement covering the period January 1, 1959 to December 31, 1963 and extension agreements for 1964 and 1965. ASCAP has refused to execute the tendered agreements for the simple reason that appellant has not yet tendered the license fees retroactively due under the agreements. Thus appellant is today apparently perfectly willing to violate what it asserts to be Washington law. The only thing it remains unwilling to do is pay money.

ASCAP advised infringing broadcasting stations that performances of copyrighted musical compositions in the Society's repertory would constitute infringement unless the prior consent of the copyright proprietors or of the Society had been obtained (R. 30, Fact 41, App. A, p. 26, Fact 64).

And, beginning in 1961, appellees and other copyright proprietors commenced lawsuits against 11 unlicensed radio stations in the State of Washington, including the present appellant (R. 30, Fact 40, App. A, p. 26, Fact 63).

Except for this case, all of these lawsuits have now been settled by the broadcasters' taking ASCAP licenses retroactive to 1959—thus putting the infringers on a par with the broadcasters who had taken the licenses issued pursuant to Judge Ryan's order (R. 49).

ASCAP's Compliance with Washington Law.

For many years, and particularly in 1961, 1962 and 1963, ASCAP, on behalf of appellees and other members, has filed with the Secretary of State of the State of Washington a catalog of their copyrighted musical compositions, together with forms of licenses available to all would-be users in the State of Washington (P. Ex. 1, P. Ex. 5, P. 6, D. Ex. A-7, D. Ex. A-8, D. Ex. A-8a). As Judge Solomon found, no public official of the State of Washington has ever requested ASCAP to make any change in either the form or substance of its filings.

In making these filings, ASCAP relied on and was guided by a letter dated August 23, 1948, from the Attorney General of the State of Washington to the Secretary of State of the State of Washington (of which ASCAP received a copy) in which the Attorney General stated that, in his opinion, the filing made by ASCAP in the office of the Secretary of State on April 20, 1948 was in compliance

with Chapter 19.24, R. C. W. (P. Ex. 9, App. A, p. 24, Fact 53).

In consequence of these filings, ASCAP and its members have fully complied with the provisions of Chapter 19.24, R. C. W.

Summary

We submit that the single most important fact in this case is this: by virtue of the 1959 Washington rate-fixing proceeding, at any time after November 20, 1959, appellant could have obtained a license from ASCAP, valid under Washington law, to perform publicly for profit any musical composition in ASCAP's repertory, subject only to its obligation to pay a license fee which Chief Judge Ryan had determined to be reasonable—with the approval of appellant's present counsel.

Appellant had five options available to it, four of which were lawful:

Appellant could have obtained a blanket license and along with it the right to play as much or as little, as frequently or as rarely, any of the compositions in the ASCAP repertory. Or appellant could have obtained a per program license which would have required it to pay a license fee only for those programs in which appellant broadcast music from the ASCAP repertory.

And, if the foregoing alternatives were unacceptable to appellant, it could have undertaken to deal with ASCAP members directly.

Or appellant could have refrained from giving public performances for profit of music in the ASCAP repertory.

Instead, appellant chose the fifth—the unlawful—alternative. Appellant never obtained any license. It never sought to deal with anyone. It continued its unconscionable conduct in appropriating appellees' property without cause and without justification.

Summary of Argument

1. The affirmative defenses based on Washington law are without merit. Appellees and ASCAP have complied in every respect with the statutory requirements of Ch. 19.24, R. C. W. Moreover, even if appellees—or ASCAP—had not complied with a local Washington statute, that non-compliance could not be used as a defense in this suit brought in a federal court to protect appellees' rights under federal law.

2. The affirmative defenses based on federal law are without merit. Appellees have not unlawfully extended their copyright monopolies nor are they guilty of violating the antitrust laws in any other respect. Moreover, appellant, which has never exercised the rights granted by Section IX of the Amended Final Judgment, has no standing to claim that it has been damaged or prejudiced by appellees' conduct or by ASCAP's conduct.

3. In the circumstances of this case, where appellant is a deliberate and wilful infringer and where appellees' infraction of the antitrust laws, if it exists, is at best doubtful and marginal, enforcement of the Copyright Law against appellant clearly outweighs enforcement of the antitrust laws against appellees.

I.

THE AFFIRMATIVE DEFENSES BASED ON WASHINGTON LAW ARE WITHOUT MERIT

There are two answers to appellant's contention that appellees have violated Chapter 19.24, R. C. W.: First, it is just not so. Second, even if appellees had violated a local Washington statute, their violations would be irrelevant

in this suit, brought in a federal court to protect appellees' rights under federal law.

We shall begin by demonstrating that the Washington statute has not been violated:

The Filing Requirements.

Appellees have fully complied with the filing requirements of §§ 19.24.040, 19.24.050 and 19.24.055, R. C. W., and Judge Solomon so ruled (App. A, p. 30, Conclusion 6). As we have seen, no Washington public official has ever suggested otherwise (App. A, p. 24, Fact 52).

Appellant now contends that the filing requirements of the state statute were not complied with because ASCAP's members (including appellees) never filed individually under the state law—only ASCAP filed on behalf of all its members. But the statute will be read in vain for any requirement that the individual ASCAP member must duplicate the filings already made by ASCAP.

In appraising appellant's contention that the Washington statute should be read as requiring double filings, the Court will perhaps wish to know that the record is barren of any suggestion that appellant or any other Washington broadcaster ever inspected any ASCAP filing.

“Extortion and Terror.”

Appellant claims that appellees and other ASCAP members have violated § 19.24.060, R. C. W., by bringing lawsuits against infringing broadcasters in the State of Washington. Appellant professes to see these suits as part of a “systematic campaign . . . to illegally fix prices . . . through the use of extortionate means and terrorizing practices,” violative of the statute. We suggest that it would be more appropriate to view these suits as an effort by appellees and other members of ASCAP, after having been

despoiled of their rights for many years, to put an end to piracy and to redress the rights granted to them by Congress pursuant to the Copyright Clause of the Constitution.

Appellant professes to find such evidence in the fact that Rogan Jones was joined as a defendant in one of the actions commenced against International Good Music, Inc. The answer to appellant's claim is to be found in Judge Solomon's finding (App. A, p. 9, Fact 10)—amply supported by the record (Tr. 277-279, 288-289, 310-312, R. 30, Fact 7)—that

“Defendant Jones is and has been the dominant influence in defendant International Good Music, Inc. and has determined its policies for more than 25 years. It was his decision:

“(a) that copyrighted musical compositions should be broadcast regularly over radio stations owned and operated by defendant International Good Music, Inc. without the consent of the copyright owner and without license from any licensing agency;

“(b) that no license fee or royalty should be paid to any copyright owner or to any licensing agency.”

In short, defendant Jones was joined as a party because—as Judge Solomon found—his conduct was “particularly flagrant” (App. A, p. 6).

Issuing Blanket Licenses.

Appellant contends that § 19.24.020, R. C. W., bars issuance of “blanket” licenses without exception and that ASCAP's offering of “blanket” licenses should operate to bar its members from enforcing their rights under the Copyright Law. The section provides:

“It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: . . .”

The words of § 19.24.020 conceivably permit two readings as to whether blanket licenses are always forbidden. It is arguable that § 19.24.020 makes it absolutely unlawful “to issue blanket licenses in this state” whether or not per piece licenses are also offered. For the statute makes unlawful a whole series of acts including “to band together,” “to pool their separate interests,” “to federate, or join together” and “to issue blanket licenses,” and the proviso says only that “such persons may *join* together if they issue licenses on rates assessed on a per piece system of usage” (emphasis added). Thus, it is logically possible to argue that the issuance of per piece licenses permits only “joining”; it remains unlawful to do all the other acts enumerated. Regardless of the offering of a per piece license it may be argued, no two copyright proprietors may “band together,” or “pool their separate interests,” or “federate” or “issue blanket licenses.”

But the statutory language may far more sensibly be read as permitting “blanket licenses,” “federating,” etc., provided per piece licenses are also offered.

This Court must decide which of the two readings makes better sense—and so should be deemed the reading which the Washington Legislature intended.

Appellant's reading of the statutory language as an absolute bar on blanket licenses, we submit, has little in logic to commend it. It can scarcely be lawful to "join," but not to "band together" or "pool" or "federate"—no meaningful distinction among these acts can be perceived. And if it is as lawful to band together, pool or federate as it is to join—provided per piece licenses are offered—then it must be lawful also to issue blanket licenses, provided per piece licenses are offered. The proviso cannot refer to two or three of the enumerated acts and not to all.

Consideration of the statutory purpose leads to the same reading which is suggested by logic. We are dealing, after all, with an anti-monopoly statute—§ 19.24.060 subjects the music business to the police power of the State "in order to prohibit, discourage and prevent monopolistic practices." This objective is entirely accomplished by reading § 19.24.020 as permitting blanket licenses if per piece licenses are offered as an alternative—since the statute requires also that the per piece license rates be no higher in Washington than in other states. For while a blanket license (a license charging a percentage of all receipts regardless of how much music is used) might be an oppressive device under some circumstances if it were the only form of license offered, no harm could result if non-discriminatory per piece licenses (where payment is made only as the music is used) were simultaneously offered.

Precisely this thinking, of course, underlies the Amended Final Judgment (D. Ex. A-2). There, as we have seen, ASCAP is permitted to issue blanket licenses—which offer great convenience to the user as well as to ASCAP—but ASCAP is required also to offer per program licenses at

rates which offer the prospective licensee a "genuine economic choice" between blanket and per program (Sec. VII). The Amended Final Judgment was drawn under the federal antitrust laws, which have as their target the same monopolistic practices against which the Washington Legislature acted. In deciding which of two possible readings of § 19.24.020 to accept—whether it bars all blanket licensing or permits it provided a reasonable alternative is offered—it makes sense to accept the reading which parallels the requirements of federal law.

Finally, we would note that Judge Ryan, Judge Solomon and the Attorney General of Washington have all reviewed ASCAP's licenses in the light of Ch. 19.24, and all have concluded that the blanket licenses are lawful in view of the simultaneous offering of per program licenses.

"Pooling Copyrights" and "Price Fixing".

There is, we submit, no substance to appellant's contention that appellees and other ASCAP members have "pooled" their separate copyrighted interests in ASCAP for the purpose of fixing prices in violation of § 19.24.020.

To begin, it is stipulated and Judge Solomon found that each appellee has at all times stood ready to negotiate for a separate license to perform any of his musical compositions (R. 30, Fact 27, App. A, p. 23, Fact 50). There was no testimony at the trial that any would-be user of music in Washington ever asked any appellee or any other plaintiff for a separate license and was refused. Under these circumstances, there can be no finding that appellees have pooled their interests or otherwise joined together to fix prices. The fact is that appellees have joined ASCAP because such a clearing-house is needed for them and for users—but they have always stood willing to deal as individuals (App. A, p. 12, Fact 25).

In addition, as we have seen, ASCAP has no power to fix license fees for the right to perform the music in its repertory. Under the Amended Final Judgment (D. Ex. A-2), any would-be user has the absolute right to have the United States District Court for the Southern District of New York determine a reasonable license fee.

Moreover, the proviso in § 19.24.020 reads:

“Such persons may join together if they issue licenses on rates assessed on a per piece system of usage.”*

ASCAP and its members, we submit, issue licenses “on rates assessed on a per piece system of usage” in two ways. First, ASCAP offers per program licenses which assess rates “on a per piece system of usage.” And, second, ASCAP’s individual members at all times stand ready to license individually—the would-be user need only ask. (Appellant, it should be noted, has never sought to deal individually with any ASCAP member or any other copyright proprietor [App. A, pp. 23-24, Fact 50].)

1. *The Per Program License.* Turning first to the ASCAP per program license, the issue is whether its rates are “assessed on a per piece system of usage.”

It will be recalled that, under a per program license, a broadcaster pays a fee to ASCAP only on a program which uses ASCAP music. Thus, in effect, with a per program license a broadcaster buys the right to perform ASCAP music by the piece; it is within the broadcaster’s

*Ch. 19.24 nowhere defines the term “per piece system of usage.” Appellant’s suggestion on p. 45 of its brief that § 19.24.140 does provide such a definition is erroneous. Section 19.24.120 at great length sets forth a complex procedure for civil enforcement of Ch. 19.24. It does not purport to define—and it does not define—the term “per piece system of usage.” Insofar as we know, the enforcement procedures of § 19.24.140 have never been utilized.

exclusive province to tailor his own programs so that the program is the piece; the broadcaster himself determines whether he wants one piece or more and the size of and nature of each piece. Moreover, the license fee itself is a percentage of an amount which the broadcaster himself determines, the amount he charges a sponsor for his program—neither ASCAP nor the copyright owner has any voice in determining the price which the broadcaster charges for the time segment during which he uses ASCAP music.

Appellant seems to contend that only a license which either (a) charges the same sum for performance of any composition in the licensing organization's repertory, or (b) charges a specified sum for each performance of a named composition, is permissible under the statute. Neither of these two techniques is feasible.

ASCAP's repertory embraces such little-known works as "A Jardineira," "A La Cubana" and "A La Nanita Nana." The Washington Legislature surely could not have intended to require that the same fee be charged for these compositions as is charged for "White Christmas," "Easter Parade," "Stardust," a Bartok concerto, a Copland suite or a Gershwin rhapsody.

Nor could ASCAP establish a separate schedule of rates for each of the hundreds of thousands of compositions in its repertory. To be fair to its members, ASCAP would have to give an opportunity to each member to submit his own schedule of rates for each of his works; the member and ASCAP would have to consider dozens of different factors as to each composition and each use: the particular user, the nature of the use, the amount received by the user, the popularity of the composition, time of day broadcast, season of the year (the rate for "White Christmas" should surely vary between Christmas Day and July 4), power of the station, etc. Preparing such detailed schedules would be administratively impossible.

The Washington Legislature, we respectfully suggest, could not have intended to permit only the impossible when it permitted "rates assessed on a per piece system of usage." Hence, the statutory language should not be construed as permitting only the impossible. Rather, the words should be given the reasonable reading which their flexible language suggests. Reading them reasonably, the ASCAP "per program" license fits the "per piece" provision.

The court below so concluded. In his opinion, Judge Solomon said (App. A, p. 5):

"The enforcement of the Washington statute, as construed by the defendants, would not only jeopardize the efficient licensing and policing of performance for profit, which can only be done by licensing organizations such as ASCAP, . . . but it would also deprive plaintiffs and all other copyright owners of the privilege of profiting from their federally granted copyright monopoly.

"To construe the provisions of the Washington statute . . . so as to make the acts of plaintiffs or ASCAP in this case unlawful would raise grave questions concerning the constitutionality of the Washington statute under the Fourteenth Amendment. . . ."

Having these considerations in mind, Judge Solomon ruled (App. A, p. 31, Conclusion 11):

"The ASCAP per program license may reasonably be regarded as assessing rates 'on a per piece system of usage' as the Washington statute uses that phrase."

Were there any doubt, it might well be resolved by recalling the problem at which the Legislature aimed in

enacting Ch. 19.24. In 1937, the only form of radio license that ASCAP offered in Washington or anywhere else was the blanket license; the per program license did not exist. Not until the Consent Decree of 1941 was ASCAP required to offer per program licenses.

Thus, in 1937, a would-be user of ASCAP music had to take a blanket license or nothing—he had no alternative. And under a blanket license, even if a theoretical broadcaster wanted to play ASCAP music only two or three times a year, he had to pay ASCAP a percentage of all revenues received throughout the year. This was the problem with which the Legislature sought to cope by enacting Chapter 19.24, by requiring that a user be offered, as an alternative to the blanket license, a license where rates are “assessed on a per piece system of usage.”

The per program license gives the broadcaster the option which the Legislature intended to insure. Under a per program license, the user does not pay for ASCAP music when he does not play it; he pays only on programs using ASCAP music. In conformity with the Legislature’s requirement, he is free to play only what he needs, and pay for it as it is used—in precise effect, by the piece.

There is one further reason to construe the statutory language as permitting ASCAP’s per program license: under the Amended Final Judgment, ASCAP is required to issue per program licenses (D. Ex. A-2, Sec. VII [B]) and is forbidden to issue licenses for specific compositions unless both the user and the ASCAP member in interest so request, in writing (Sec. VI). Hence, if the statute were read as appellant here demands—as forbidding per program licenses and requiring licenses of individual compositions—it would be in flat conflict with the Amended Final Judgment. Of course, the Legislature in 1937 did not have the Amended Final Judgment of 1950 before it.

But in construing a state statute in 1965, in choosing between two permissible readings, a court is surely entitled by considerations of comity to accept the reading which will avoid conflict with a federal judgment. It is not lightly to be assumed that the Washington Legislature would seek conflict with the requirements of federal law.

We have noted that the Washington Attorney General in 1948 formally rendered to the Secretary of State an opinion that the ASCAP per program license makes offering of the blanket license lawful. In 1962, as appellant points out, the Attorney General wrote a letter to a member of the State Senate terming the per program license a "blanket" license and hence illegal (D. Ex. A-14). The letter-writer offered no analysis or citation of authority, only his one-sentence *ipse dixit*. In one sense, the description is correct: the per program license is "blanket" in that, like the traditional blanket license, it covers the entire ASCAP repertory, and authorizes the licensee to use any and all compositions in the ASCAP repertory without a separate license for each use. But the letter-writer failed to observe that the traditional blanket license is "blanket" in two senses: first, a single license permits the use of any and all compositions in the repertory without separate negotiations for each use (a factor of great advantage to the user); and, second, the rate base on which its charges are assessed includes all revenues. It is this latter sense in which the traditional blanket license might impose a burden unless an alternative were available—the station performing three ASCAP compositions yearly might have to pay a license fee calculated on its full year's revenues. It seems reasonable to conclude that this is the possibility against which the Legislature acted. But the per program license is not "blanket" in this latter sense—the rate base is only the revenues derived from programs using ASCAP music. There is no conceiv-

able threat in a license which is "blanket" only in that it permits use of an entire repertory under a single license. There is no reason to believe that the Legislature (which did not define "blanket licenses") sought to bar licenses which are "blanket" only in this sense—they are not dangerous, merely convenient. Hence, the Attorney General erred in asserting that the per program license is illegally "blanket."

2. *Individual Licensing by ASCAP Members.* Even if appellant were right, and the proviso in § 19.24.020 permitted only licenses of specific individual compositions, ASCAP and its members would still meet the statutory test. For under the Amended Final Judgment, as we have seen, ASCAP's members retain the absolute right to license their individual compositions, and, indeed, ASCAP is barred to license specific compositions except upon specific joint request of user and member (Sec. VI, D. Ex. A-2).*

The freedom of ASCAP's members to deal individually is not here questioned. On the basis of a stipulation by the parties, the court below found (R. 37, Fact 51):

"Plaintiffs have at all times in the last ten years been ready to negotiate with any broadcaster in the State of Washington for a license to perform any of plaintiffs' copyrighted musical compositions on any

*Appellant seeks to make much of the alleged fact that whenever Washington broadcasters wrote to ASCAP asking for "per piece" licenses, ASCAP allegedly did not even reply (Appellant's Brief, p. 48). First, it should be noted that none of these requests were made pursuant to Section VI of the Amended Final Judgment which regulates ASCAP's right to issue licenses for the performance of specific compositions. Second, it is not true that ASCAP did not reply—Louis Weber, ASCAP's assistant sales manager in charge of radio and television, testified at his deposition that he did respond to such requests by advising broadcasters of the licenses that were available to them. Prior to 1959, he told them about the blanket and per program licenses available prior to the 1959 rate-fixing proceedings. Since 1959, he has told them about the blanket and per program licenses available as a result of the 1959 rate-fixing proceeding (Weber Dep., p. 9, D. Ex. 31-d).

mutually agreeable basis, including 'rates assessed on a per piece system of usage.' In the last ten years, no broadcaster in the State of Washington has requested such a license from any plaintiff. No defendant has ever made any attempt to contact any plaintiff individually for the purpose of obtaining licenses to play any of plaintiffs' compositions on a 'per piece' or any other basis."

Two consequences flow from these unquestioned facts. First, without regard to the per program license, plaintiffs are ready to offer whatever licenses for specific compositions the user may desire. Hence the proviso of § 19.24.020 is satisfied concerning "licenses on rates assessed on a per piece system of usage."

Far more importantly, however, the availability of licenses from individual members, as we have already seen, completely bars application of Chapter 19.24 to ASCAP and its members. For Chapter 19.24 refers to copyright proprietors who "band together" or "pool their interests" or "conspire, federate or join together." ASCAP's members have not so "banded together" or "pooled." They say: "Deal with us individually, or collectively, whichever you wish." There is, in consequence, no "band," no "pool."

The Court will recall that the facts were otherwise in 1937, when Chapter 19.24 was enacted—then, since ASCAP had exclusive grants from its members, the would-be user could deal with ASCAP, or stop performing ASCAP music. Even in 1941, after the first decree in *United States v. ASCAP*, it could still be contended that ASCAP constituted a "banding together," since, while ASCAP's members were free to license individually, the proceeds of their licensing went to ASCAP (D. Ex. A-1, Sec. II[1][a]). Only with the Amended Final Judgment in 1950 were the members—and the public—guaranteed the

right to make such individual license arrangements as they might desire, by the ban on ASCAP's receiving other than a non-exclusive license (D. Ex. A-2, Sec. IV[A]).

Since 1950, then, it has been impossible to term ASCAP a "pool" or a "banding together." These actions require a degree of mutual commitment, and ASCAP's members have none. ASCAP today exists as a convenient alternative to individual negotiation, nothing more—it is not an entity forbidden by any statute aimed at "banding together," "pooling" or the like.

* * *

Each of the contentions now made by appellant regarding appellees' alleged violations of Chapter 19.24, R. C. W., was made before Judge Solomon. Each was rejected by him. His decision is, we submit, clearly correct and should be affirmed.

II

THE ALLEGED VIOLATIONS OF WASHINGTON LAW CONSTITUTE NO DEFENSE

Even should the Court find that appellees have violated Washington law, appellant could not urge these violations as defenses to this infringement action: First, by virtue of the Supremacy Clause of the United States Constitution, no state can deny to appellees the rights and benefits conferred by federal law. Second, appellant's confiscation of appellees' property can not be justified by conduct on the part of appellees which did not involve any wrongdoing against the appellant and which did not prejudice or mislead it.

Leo Feist, Inc. v. Young, 138 F. 2d 972 (7th Cir. 1943), is, we submit, directly in point on both issues. There plaintiff, a publisher member of ASCAP, sought an injunction

and damages for infringement. In the District Court, defendant conceded that he had infringed plaintiff's copyright but claimed that plaintiff was deprived of its right to maintain its infringement suit because it had failed to comply with the provisions of a certain Wisconsin statute.

The Wisconsin statute provided that no person, association or corporation other than the "true or original composer" could, directly or indirectly, issue licenses or other agreements for the public rendition of copyrighted musical numbers by persons within Wisconsin, unless said person, association or corporation first obtained a license from the Secretary of State to transact such business. An applicant for a license was obliged to file certain information with the Secretary of State and to pay a franchise tax equivalent to 25% of its gross receipts from persons within Wisconsin. The statute also provided that anyone who attempted, by threats of suit or other means, to compel persons in the State of Wisconsin to purchase copyright licenses was guilty of a misdemeanor, unless he had first obtained a license.

Plaintiff conceded that it had violated the statute and the District Court, after a trial on the merits, sustained defendant's contention that plaintiff's violation of the statute was a good defense. The Court dismissed plaintiff's complaint, 46 F. Supp. 622.

On appeal, the Court of Appeals for the Seventh Circuit reversed. The Court first considered the effect of the Wisconsin statute and concluded that violation of the statute could not operate as a bar to the bringing of a copyright infringement suit (138 F. 2d at 974):

"We do not believe that the Wisconsin statute should be permitted to prohibit the bringing of a federal suit. The Federal Copyright Act lays down a prohibition against the appropriation of the pro-

prietor's copyrighted composition unless consent is given. And it is familiar doctrine that the prohibition of a federal statute may not be set at naught by a state statute. *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173, 176, 63 S. Ct. 172, 87 L. Ed. 165. Therefore, since a right would not long be respected if it could be violated with impunity, the remedy of an infringement action in the federal courts must still be open to plaintiff. Correlatively, the benefits of a federal statute may not be denied by a state statute, *Sola Electric Co. v. Jefferson Electric Co.*, *supra*; see *Orlando Candy Co. v. New Hampshire Fire Ins. Co.*, D. C. 51 F. 2d 392, 393."

The Court then turned to the question of whether, under equity principles, plaintiff's conduct could justify defendant's appropriation of plaintiff's property. The Court said (138 F. 2d at 974-5):

"By refusing to grant plaintiff's prayer, the District Court not only deprived plaintiff of its copyright, but in effect gave judicial blessing to defendant's confiscation of it. Since equity seeks above all else to do justice, we cannot agree that a court should supinely sit by while such unlawful appropriation occurs. It is an elementary maxim of equity jurisprudence that there is no wrong without a remedy, and certainly plaintiff chose the proper forum and followed the statutorily prescribed procedure by which to assert that remedy. The District Court stated that a court of equity 'will not permit itself to be used as an instrumentality by which a party may effectuate a violation of positive law or for the evasion of the requirements of ethics and mor-

ality,' citing many authorities therefor. But by the court's inaction, defendant's violation of the copyright statute was sanctioned and the unethical appropriation was approved. The authorities cited by the District Court are not controlling here because the conduct of the plaintiff in them was fraudulent and directly connected with the issues being litigated, whereas here plaintiff has not been guilty of any inequity, unconscionable act, or wrongdoing towards the defendant. Neither has it misrepresented its musical work, which forms the basis of this action, or the copyright thereof, either to the defendant, or to the public.

"In our view, a rule of equity should never be applied if its application results in injustice, which would result here if plaintiff were not allowed to enforce its congressionally bestowed right to prevent unauthorized use of its copyright. True, plaintiff failed to comply with the Wisconsin statute. But the rule is not inexorable that a plaintiff who comes into court with unclean hands is always to be denied relief, regardless of other circumstances in the case; for, if the defendant has been guilty of conduct more unconscionable and unworthy than that of the plaintiff, the rule may be relaxed. *Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co.*, 6 Cir., 95 F. 2d 978, 983."

Finally, the Court noted that its decision did not mean that plaintiff could not be held responsible to the state of Wisconsin. But it concluded that (138 F. 2d at 976):

"... plaintiff's failure to secure a license was an offense against Wisconsin of which it alone could take cognizance; and plaintiff's dereliction in this

regard in no wise prejudiced the defendant or justified him in confiscating plaintiff's property. We think the clean hands maxim should be applied only where it promotes right and justice, not by way of punishment for extraneous transgressions. See *Keystone Driller Co. v. General Excavator Co.*, 290 U. S. 240, 245, 54 S. Ct. 146, 78 L. Ed. 293; *Ohio Oil Co. v. Sharp*, 10 Cir., 135 F. 2d 303, 307; *Chicago v. Union Stock Yards & Transit Co.*, 164 Ill. 224, 238; 45 N. E. 430, 35 L. R. A. 281.

* * *

"We are not approving plaintiff's noncompliance with the Wisconsin statute, and we think Wisconsin may hold plaintiff accountable for the tax required by the statute as well as punishing it for not obtaining the required licenses. But orderly administration of justice requires that, on issues properly framed, the question be relegated for determination to the Wisconsin courts."

Feist v. Young provides a precise and controlling rule for the case at bar. Here, as there, appellant seeks to deprive appellees of their rights under federal law by resort to a state statute, and seeks to justify its confiscation of appellees' property by alleging conduct on the part of appellees wholly unconnected with appellant's unlawful acts. The federal courts have not permitted federal rights—conferred by the Constitution and laws of the United States—to be so easily defeated.

Guidance is given also by *Sola Electric Co. v. Jefferson Electric Co.*, 317 U. S. 173 (1942); the Court said (317 U. S. at 176):

"When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the

statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute and the federal policy which it has adopted. To the federal statute and policy, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2; *Azwotin v. Atlan Exchange Bank*, 295 U. S. 209; *Deitrick v. Greaney*, 309 U. S. 190, 200-01."

Many other cases are to the same effect. For example, the federal courts have refused to give effect to state statutes, limiting or prohibiting an employee's right to strike, on the ground that these statutes conflicted with an employee's rights under federal law. *Automobile Workers Union v. O'Brien*, 339 U. S. 454 (1950); *Amalgamated Ass'n of Street Electric Railway & Motor Coach Employees v. Wisconsin Employment Relations Board*, 340 U. S. 383 (1951). In the last cited case, the Supreme Court said (340 U. S. at 394-6):

"... where . . . the state seeks to deny entirely a federally guaranteed right which Congress itself restricted only to a limited extent in case of national emergencies, however serious, it is manifest that the state legislation is in conflict with federal law. . . . Such state legislation must yield as conflicting with the exercise of federally protected labor rights."

We submit that the foregoing authorities demonstrate the insufficiency of the defenses based on appellees' alleged violations of Washington law. Whatever control Washington may choose to exercise over combinations of copyright owners, the fact remains that appellant is a wilful infringer of appellees' federal copyrights. Washington law may not deprive appellees of their right to enforce their copyrights.

Moreover, even if appellees were part of a combination fixing prices in the state of Washington, even if they had failed to satisfy Washington's filing requirements, there would still be no justification for appellant's unconscionable conduct in appropriating appellees' property. This Court should not "supinely sit by while such unlawful appropriation occurs" and should not give "judicial blessing to defendant's confiscation" of appellees' property, *Leo Feist, Inc. v. Young*, *supra*, at 975. Appellees have not "been guilty of any inequity, unconscionable act, or wrongdoing towards the defendant," nor have they "misrepresented [their] musical work[s] . . . either to the defendant, or to the public," *Ibid.* See also *Interstate Hotel Co. v. Remick Music Corp.*, 157 F. 2d 744 (8th Cir 1946), *cert. denied*, 329 U. S. 809 (1947), where the Court said, adjudging infringement in circumstances paralleling those at bar (157 F. 2d at 749):

"Of the remaining assignments of error, little need be said. One is that the appellees should be denied relief in a Federal court of equity on the ground that they come into court with unclean hands. The basis for this assignment seems to be that appellees were guilty of some nefarious conduct by refusing to engage in business in Nebraska on the conditions permitted by Nebraska law, by instituting these suits for the protection of their copyrights at the same time and trying them together, and by participating in and accepting the benefits of the activities of the American Society of Composers, Authors, and Publishers in States in which the activities of the Society are legal. The appellants are in poor position to question the motives and character of appellees when they themselves are guilty of wrongfully appropriating appellees' property. Leo

Feist, Inc. v. Young, 7 Cir., 138 F. 2d 972. Such considerations aside, this assignment hardly merits comment."

Washington law should not be construed so as to grant to appellant the right to take appellees' property without paying for it. As the Court pointed out in *Leo Feist, Inc. v. Demarie*, 16 F. Supp. 827 (W. D. La. 1935), when plaintiffs' noncompliance with a Louisiana licensing statute was urged as a defense to a copyright suit (16 F. Supp. at 828):

"... the action is one for the violation of a copyright granted by the federal government, and it will not be assumed that the Legislature meant to deny a litigant the right to go into a federal court for the protection of the property right granted by federal laws except upon conditions prescribed by the state Legislature, in the absence of clear language indicating such purpose."

In sum, Washington has not—and it could not constitutionally—give appellant the right to appropriate appellees' property.

III.

THE AFFIRMATIVE DEFENSES BASED ON FEDERAL LAW ARE WITHOUT MERIT

We do not comprehend the basis for appellant's contention that appellees, together with ASCAP, have violated the federal antitrust laws.

Appellant's brief uses almost all the epithets known to federal antitrust law—"price-fixing," "unlawful extension of copyrights," "block booking," "tying agreements,"

“blind selling practices,” etc. But after all the words have been used—after all the irrelevant citations of cases have been put forward—the following still remain as hard facts:

ASCAP has no power to fix license fees. Every would-be user of ASCAP’s repertory has an absolute right to obtain a license from the Society and an absolute right to obtain a judicial determination of a reasonable license fee.

Moreover, the legality of ASCAP’s activity under the antitrust laws is under the constant scrutiny of the Department of Justice and the United States District Court for the Southern District of New York where the ASCAP consent decree is administered (App. A, p. 3).

We do not comprehend how appellant, which has never exercised the rights granted by Section IX of the Amended Final Judgment, can now complain that it has been damaged or prejudiced by ASCAP’s conduct.

We can go further:

On the record before this Court, it is plain that ASCAP, governed by the Amended Final Judgment, has not violated any antitrust law but has, in fact, established a classically free market in musical compositions. Buyers and sellers of the right to perform musical compositions are guaranteed free access to each other, and if their bargaining does not produce agreement on a fair price, a judge is standing by to adjudicate the matter.

On the supply side, any composer, author or publisher is insured ready access to the market where songs are licensed: under the Amended Final Judgment, no one may be excluded from membership in ASCAP who meets certain minimal standards.

On the demand side, the Amended Final Judgment gives every user of music an absolute right to obtain a license to the entire ASCAP repertory on non-discriminatory terms. He can not be excluded from the market by

virtue of anyone's control of all or any part of it (and the right of a user to deal with individual copyright proprietors is preserved by the Amended Final Judgment's bar against ASCAP's interference in such dealings).

Finally, the reasonableness of the prices charged by the suppliers to the consumers is subject to judicial determination. And the burden of establishing reasonableness is on the supplier.

Appellant purports to see in ASCAP's blanket and per program licenses something akin to tie-in sales (where a seller refuses to sell Item A unless Item B is purchased simultaneously) or to "block booking" (a form of tie-in sometimes employed in the motion picture industry, whereby an exhibitor can not obtain licenses to films separately, but is forced to license a whole group of films) see *United States v. Paramount Pictures, Inc.*, 334 U. S. 131 (1948); *United States v. Loew's, Inc.*, 371 U. S. 38 (1962). The evil in these practices is that the buyer is compelled to buy what he does not want in order to obtain what he does want.

But ASCAP imposes no such compulsion. True, it does offer licenses to its entire repertory—in effect offering a licensee a library card to use whatever he wishes. And broadcasters regularly seek such licenses because of the convenience they offer. But a broadcaster is absolutely free to deal with the individual copyright proprietor if he wishes a license for only one song. The broadcaster is not faced with the all-or-nothing proposal which raises antitrust objections to block booking and other forms of tie-ins.

Appellant repeatedly cites *Hazeltine Research, Inc. v. Zenith Radio Corporation*, 239 F. Supp. 51 (N. D. Ill. 1965). But that case is of no pertinence here. In *Hazeltine*, the court held that the holder of a group of patents violated the Sherman Act when it insisted in licensing the patents as a group, and offered licenses on single patents only "at royalty rates far in excess of the package rate . . . to force

by unlawful coercion the acceptance of unwanted patents," 239 F. Supp. at 77. Thus, in *Hazeltine*, the prospective licensee who sought a license for an individual patent had no real choice but to take a license for the pool—and therein lay the evil, as in the tie-in and block booking cases. As we have seen, however, a broadcaster has a full range of choices—he may take a blanket license, or a per program license, or he may deal with individual proprietors. The choice is his, and it is unrestrained. Moreover, in *Hazeltine* the prospective licensee—unlike the user of music in ASCAP's repertory—could not obtain a judicial determination of a reasonable license fee. Hence *Hazeltine* is of no application.

Alden-Rochelle and Witmark

Although appellant has no facts to support its contentions, it has sought to find the applicable law in *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S. D. N. Y. 1948), and *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948). Both cases involved ASCAP's relations with motion picture exhibitors over 17 years ago—*prior to the 1950 Amended Final Judgment*.

As the Court of Appeals for the Second Circuit pointed out in *Shenandoah Valley Broadcasting, Inc. v. ASCAP*, 331 F. 2d 117, 121 (2d Cir. 1964), *cert. denied*, 371 U. S. 997 (1964):

"The Amended Final Judgment of March 14, 1950, considerably amplified an earlier consent judgment entered in the Government's antitrust suit against ASCAP nine years before. The 1941 judgment contained many negative injunctions with respect to licensing, but had no provision specifically addressed to television, which had not yet been developed commercially, and no provision for judicial fixing of license fees if a licensee and ASCAP were unable to agree on terms. The 1950 Judgment

was designed, in part, to fill these gaps, as well as to meet the problems with respect to motion picture licensing revealed by *Alden-Rochelle, Inc. v. ASCAP*, 80 F. Supp. 888 (S. D. N. Y. 1948) and *M. Witmark & Sons v. Jensen*, 80 F. Supp. 843 (D. Minn. 1948)."

In recognition of the changes thus wrought, we may note, Judge Leibell vacated the injunctive order which he had entered in *Alden-Rochelle*.

In consequence, *Alden-Rochelle* and *Witmark* are of only historical interest today. Neither is of any pertinence here.

Appellant's "Conspiracy"

In its eager hunt for a reason to avoid paying for its infringements, appellant comes up with one last devil: it contends that ASCAP and its members have entered into a "conspiracy" to refuse to grant licenses to recording companies for public performance of recorded musical compositions on broadcasting stations. If not for this "conspiracy," says appellant, record companies could obtain performance rights which would inure to the benefit of radio stations which played recorded music on the air. Since almost all of the music played by appellant is recorded music, appellant says, it could thereby avoid the necessity of paying for the right to perform copyrighted musical compositions.

The basic flaw in appellant's contention is that it is a creation of imagination rather than evidence. Not one single piece of evidence can be adduced to support appellant's charges of "conspiracy". There is no tacit understanding among ASCAP's members not to license performing rights to record companies. ASCAP and each

member of ASCAP have the unfettered right to license performing rights to record companies. It is stipulated that no such license is in existence—but it is stipulated also that no record company has ever asked for such a license (R. 30, Facts 63, 64, 65, 66). Judge Solomon thus summarized and found the facts (App. A, p. 28, Fact 75):

“There is no evidence that plaintiffs or other members of ASCAP have entered into a conspiracy to prevent recording companies from obtaining licenses authorizing broadcasting stations to perform publicly for profit any musical composition.”

Evidently, record companies are just not interested in going into the business of obtaining performance rights. And, we might suggest, for good reason. Record companies make money by selling records to the public for home consumption. The records which they sell or give to radio stations are but a tiny fraction of their business. Consequently, it makes no sense for a record company to obtain a performing rights license. The record company—which stands to gain little or no profit from sales to radio stations—has no reason to assume the broadcaster’s responsibility of arriving at mutually agreeable terms with the owners or licensors of performing rights.*

The sham nature of appellant’s argument with respect to record companies is demonstrated by the testimony of

*We may note here the provisions of the Copyright Law dealing with royalty payments for recording rights. 17 U. S. C. § 1 provides in pertinent part:

“... whenever the owner of a musical copyright has used or permitted or knowingly acquiesced in the use of the copyrighted work upon the parts of instruments serving to reproduce mechanically the musical work, any other person may make similar use of the copyrighted work upon the payment to the copyright proprietor of a royalty of 2 cents on such part manufactured, to be paid by the manufacturer thereof...”

one of defendants' own witnesses at the trial. Mr. Lee Facto, who is in charge of the production of musical tapes for International Good Music, Inc., testified that these tapes are sold to other radio stations across the country (Tr. 257-258). But Mr. Facto, although he places copyrighted musical compositions on tapes, although he sells these tapes to other stations knowing that there will be public performances for profit, does not undertake to obtain performance rights for the music put on the tapes (Tr. 261-262). That, in his words, is "the individual responsibility" of the stations which put the tapes on the air (Tr. 263). And so it is—as we have shown—with record companies.

IV.

IN THE CASE AT BAR, ENFORCEMENT OF THE COPYRIGHT LAW AGAINST APPELLANT CLEARLY OUTWEIGHS ENFORCEMENT OF THE ANTITRUST LAWS AGAINST APPELLEES

Even if by some manipulation ASCAP's arrangements and practices might be brought into verbal collision with language in the precedents, that would not necessarily condemn appellees to the forfeiture of their rights. That would be but the beginning, not the end, of the inquiry. The anti-trust laws nowhere declare in so many words that one who has trespassed upon them shall automatically be denied the benefits conferred by the Copyright Law. The barrier to enforcement of copyrights by antitrust violators is one created by equity, and must be measured by equitable standards.

In *Alfred Bell & Co. v. Catalda Fine Arts, Inc.*, 191 F. 2d 99 (2d Cir. 1951), defendants raised an antitrust

defense to a claim of copyright infringement. In affirming judgment for plaintiff, the Court said (191 F. 2d at 106):

“We have here a conflict of policies: (a) that of preventing piracy of copyrighted matter and (b) that of enforcing the anti-trust laws. We must balance the two, taking into account the comparative innocence or guilt of the parties, the moral character of their respective acts, the extent of the harm to the public interest, the penalty inflicted on the plaintiff if we deny it relief. As the defendants’ piracy is unmistakably clear, while the plaintiffs’ infraction of the anti-trust laws is doubtful and at most marginal, we think the enforcement of the first policy should outweigh enforcement of the second.”

In the case at bar, “defendant’s piracy is unmistakably clear.” Appellees’ infraction of the antitrust laws, if it existed, would be “doubtful and at most marginal”; it has surely caused appellant no damage, and it has not prejudiced or misled appellant in any way. In these circumstances, enforcement of the copyright laws is clearly in the public interest and would far outweigh enforcement of the anti-trust laws against these appellees—even had they been guilty of any violation.

CONCLUSION

Appellant, we submit, is in error when it argues that this is a long and complicated lawsuit involving many facts and many issues. To the contrary, this is a simple case. The facts have been largely stipulated by the parties. Appellant has been unable to offer the slightest hint of error in any finding of fact made by the court below—let alone to demonstrate that any finding is “clearly erroneous.” And

the findings which appellant contends the court should have made are either unsupported by the record, or irrelevant or repetitious.

The issues are simple—appellant has unlawfully and without just cause appropriated appellees' property. Its defenses based both on Washington law and the federal antitrust laws have no merit—neither factually nor legally.

Judge Solomon carefully considered each of the contentions made here by appellant and found them all to be totally lacking in merit. We respectfully submit that the judgment below should be affirmed.

Respectfully submitted,

HOLMAN, MARION, PERKINS,
COIE & STONE
1900 Washington Building
Seattle, Washington 98101

J. PAUL COIE,
Of Counsel.

PAUL, WEISS, RIFKIND, WHARTON
& GARRISON
575 Madison Avenue
New York, New York 10022
Attorneys for Appellees

SIMON H. RIFKIND,
JAY H. TOPKIS,
ALLAN BLUMSTEIN,
Of Counsel.

October 11, 1965.

CERTIFICATE OF COMPLIANCE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those Rules.

JAY H. TOPKIS

Attorney for Appellees

APPENDICES

Appendix A

IN THE

United States District Court

FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

TEMPO MUSIC, INC., ET AL.,
Plaintiffs,

vs.

INTERNATIONAL GOOD MUSIC, INC.,
Defendant.

CIVIL ACTION
No. 5548

IRVING BERLIN, ET AL.,
Plaintiffs,

vs.

INTERNATIONAL GOOD MUSIC, INC.,
Defendant.

CIVIL ACTION
No. 5773

COLE PORTER, ET AL.,
Plaintiffs,

vs.

ROGAN JONES and INTERNATIONAL GOOD
MUSIC, INC.,
Defendants.

CIVIL ACTION
No. 242
(Bellingham)

GERSHWIN PUBLISHING CORPORATION,
ET AL.,

Plaintiffs,

vs.

K-91, INC.,
Defendant.

CIVIL ACTION
No. 5771

IRVING BERLIN, ET AL.,
Plaintiffs,

vs.

WESCOAST BROADCASTING Co.,
Defendant.

CIVIL ACTION
No. 2258

BETTY COMDEN, ET AL.,
Plaintiffs,

vs.

WESCOAST BROADCASTING Co.,
Defendant.

CIVIL ACTION
No. 2415

Memorandum Opinion

SOLOMON, Judge:

September 15, 1964

Irving Berlin, Richard Rodgers, Cole Porter and other owners of copyrights to more than 150 musical compositions, including such well-known songs as "White Christmas", "Easter Parade" and "Day and Night", filed actions against three radio broadcasting corporations and Rogan Jones, the president and principal stockholder of one of them, claiming violations of the federal copyright law. They seek statutory damages, orders enjoining defendants from future infringement of their copyright works, as well as attorney fees and costs.

Defendants admit the expropriation and the infringement of plaintiffs' copyrights, but they assert that plaintiffs are barred from maintaining this action because, among themselves and in conjunction with the American Society of Composers, Authors and Publishers (ASCAP), plaintiffs have conspired to fix prices and to engage in other unlawful practices in violation of the Constitution and the laws of the State of Washington, particularly Chapter 218, 1937 Session Laws (RCWA, Chapter 19.24) and the federal anti-trust laws. Defendants also assert that plaintiffs have unlawfully extended their individual copyright monopoly in violation of the copyright laws, and that by reason of "unclean hands" they have neither legal nor equitable standing to maintain these actions.

Defendants at an earlier stage of these proceedings, before a different Judge, moved to join ASCAP as a party. The motion was denied. However, the defendants assert that while ASCAP may not be a necessary party, its activities are relevant because it acts as a licensing agent for the plaintiffs and because of plaintiffs' illegal arrangements with it.

Memorandum Opinion

Plaintiffs are among 8800 members of ASCAP, whose combined inventory of over one million musical compositions is commonly referred to as the ASCAP repertory. The relationship between ASCAP and its members, as well as the operations of ASCAP as a licensing agent of the members, has been under the scrutiny of the United States Department of Justice for more than a decade. Its practices are guided by the Amended Final Decree of 1950 and the order entered in the same action on January 7, 1960. All of the plaintiffs granted ASCAP a non-exclusive right to license non-dramatic performances for profit of their copyrighted compositions.

Under the terms of the Amended Final Decree, ASCAP may not license the use of the individual compositions except on application of both user and copyright owner and ASCAP may not refuse to license prospective users of compositions from its repertory. In case of disputes concerning license fees, the Amended Final Judgment provides for judicial determination of reasonable fees in the United States District Court for the Southern District of New York.

Plaintiffs have reserved the right to license their own compositions to any user on any mutually agreeable basis, and in these cases the plaintiffs as individuals seek to enforce their copyrights.

Most of the evidence in this case was stipulated in a long and carefully prepared pre-trial order. I have studied the statement of admitted facts, the evidence adduced at the trial, the exhibits, as well as the excellent memoranda of authorities submitted by both the plaintiffs and the defendants, and I have concluded that the plaintiffs are entitled to prevail.

I had hoped to prepare a written opinion setting forth not only my reasons for such conclusion, but also an analysis

Memorandum Opinion

of the authorities upon which I relied. However, illness as well as the press of other judicial business has prevented me from doing this. I believe that the interests of the parties will be served best by announcing my decision without further delay. I also concluded that such an opinion would be of limited value because there are practically no controverted issues of fact and because both plaintiffs and defendants are represented by competent counsel who will present adequately their arguments to the Court of Appeals.

I find that plaintiffs have complied with the statutory requirements of the State of Washington. Defendants have failed to prove that ASCAP's registration of the songs in its repertory was inadequate or that plaintiffs or ASCAP violated the Washington law relating to the pooling of copyright interests without providing for per piece licensing (RCWA 19.24.020); or that the filing of these and other actions by the plaintiffs to enforce their rights under the copyright laws constituted an abuse of either State or Federal process. There is no evidence of any abusive practices by either the plaintiffs or their licensing agent which would deny them copyright protection.

I further find that there is no merit in defendants' contention that they did not take licenses with ASCAP because they feared State prosecution. I find that they failed to take licenses only because they wanted to avoid paying license fees on the same basis charged other broadcasting companies. I further find that defendants made no attempt to contact plaintiffs individually for the purpose of obtaining licenses to play plaintiffs' songs on a per piece or any other basis.

Defendants have admitted that it would be virtually impossible to deal with the composers on an individual basis for the rights to perform their songs for profit. Their

Memorandum Opinion

contentions as to what the law requires would not only make it virtually impossible to police the use of copyrighted songs, but would also greatly increase the cost of administration. The enforcement of the Washington statute, as construed by the defendants, would not only jeopardize the efficient licensing and policing of performance for profit, which can only be done by licensing organizations such as ASCAP, BMI or SESAC, but it would also deprive plaintiffs and all other copyright owners of the privilege of profiting from their federally granted copyright monopoly.

To construe the provisions of the Washington statute (RCWA, Chapter 19.24) so as to make the acts of the plaintiffs or ASCAP in this case unlawful would raise grave questions concerning the constitutionality of the Washington statute under the Fourteenth Amendment to the Constitution of the United States.

Plaintiffs have not unlawfully extended their copyright monopolies through a combination among themselves or with ASCAP, nor are they guilty of violating the federal antitrust laws in any respect alleged by the defendants. However, even if plaintiffs' conduct in any respect can be considered a violation of either RCWA, Chapter 19.24, or the federal copyright or antitrust laws, their violations are so minimal and the violations of the defendants so unconscionable that plaintiffs should not be deprived of the right to maintain these actions for the deprivation of their property.

I also find the defendant Rogan Jones, who is and has been the dominant influence in defendant International Good Music, Inc., and who has determined its policies for more than 25 years, is equally liable with the corporation for these infringements.

Memorandum Opinion

In accordance with Section 101 of the Copyright Law (17 U. S. C. A. § 101), plaintiffs have elected to seek statutory damages in lieu of actual damages and profits. For the violation of each copyright, statutory damages not exceeding the sum of \$5,000 nor less than \$250 may be assessed. Defendants have deliberately appropriated the property of plaintiffs as well as the property of many other copyright owners for more than a quarter of a century, and they have greatly profited by their wrongful conduct. The conduct of International Good Music, Inc., and its president Rogan Jones has been particularly flagrant. However, I have decided to fix damages for each violation at only \$350.00 jointly against defendant International Good Music, Inc., and defendant Rogan Jones. I have decided to fix damages against Westcoast Broadcasting Co. and K-91, Inc., for each violation at \$250.00.

The prevailing parties are also entitled to attorney fees as part of costs. The parties stipulated that I may fix the fees without taking testimony. I realize that plaintiffs' attorneys will charge much more than I will allow them and that they are entitled to such higher fees. Although \$15,000.00 is a modest fee to allow plaintiffs in all of the consolidated cases, I will allow that amount. It may be allocated among the cases in accordance with the amount of statutory damages allowed in each case.

Plaintiffs are also entitled to an injunction restraining the defendants from future infringement of plaintiffs' copyrighted songs.

Defendants' counterclaims are dismissed.

Counsel for plaintiffs shall prepare appropriate findings of fact, conclusions of law and a judgment for plaintiffs, all in accordance with this memorandum opinion.

Findings of Fact and Conclusions of Law

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF WASHINGTON
NORTHERN DIVISION

[SAME TITLE]

The above-entitled actions came on for trial on February 11, 1964. The Court, having considered the pre-trial order and the statement of agreed facts contained therein, the evidence adduced at the trial, the exhibits, and the memoranda of authorities submitted by both plaintiffs and defendants, now makes the following Findings of Fact and Conclusions of Law:

Note: Unless otherwise stated, the word "defendants" refers to the corporate defendants and not to defendant Jones.

FINDINGS OF FACT

JURISDICTION

1. These actions are brought under the Copyright Law.
2. Plaintiffs were and now are the owners of the copyrights of the musical compositions here alleged to have been infringed.

Findings of Fact and Conclusions of Law

3. Defendants are engaged in the business of operating commercial radio broadcasting stations under licenses granted by the Federal Communications Commission. Defendant International Good Music, Inc. is the owner and operator of radio station KGMI in Bellingham, Washington. Defendant Wescoast Broadcasting Co. is the owner and operator of radio station KPQ in Wenatchee, Washington. Defendant K-91, Inc. is the owner and operator of radio station KIXI in Seattle, Washington.

4. Defendants operate their radio stations commercially with a profit motive, in interstate commerce.

5. At all times here pertinent, defendant Jones has owned and now owns more than 80% of the outstanding stock of defendant International Good Music, Inc., and has been and now is the president and a director thereof.

COPYRIGHT INFRINGEMENT

6. On various dates in and about 1961 and 1962, defendants broadcast 183 musical compositions in which plaintiffs then owned and now own the copyrights; included were such songs as "Blue Skies," "I Get a Kick Out of You," "Begin the Beguine," "You Go to My Head," "You Made Me Love You" and "Falling in Love with Love." Among the plaintiffs are such composers as Irving Berlin, Cole Porter, Leonard Bernstein, Richard Rodgers, Allan Jay Lerner and Frederick Loewe.

7. All broadcasts of a particular musical composition referred to in Finding 6 were public performances for profit and were made without payment of any royalty and with-

Findings of Fact and Conclusions of Law

out the express consent of any owner of the performing rights.

8. For at least ten years, each defendant has regularly broadcast the musical compositions of plaintiffs and of other authors, composers and publishers for profit, without payment of royalty or compensation to any person.

9. The performances referred to in Findings 6, 7 and 8 were made pursuant to deliberate policy, long persisted in, and without any regard to the rights of plaintiffs and other copyright proprietors under the federal copyright law. Each defendant corporation was managed by persons experienced in radio broadcasting.

10. Defendant Jones is and has been the dominant influence in defendant International Good Music, Inc. and has determined its policies for more than 25 years. It was his decision:

(a) that copyrighted musical compositions should be broadcast regularly over radio stations owned and operated by defendant International Good Music, Inc. without the consent of the copyright owner and without license from any licensing agency; and

(b) that no license fee or royalty should be paid to any copyright owner or to any licensing agency.

11. Radio station KPQ performs publicly for profit 6,000 musical compositions per year. Many such compositions are broadcast more than once each year. Among the musical compositions broadcast more than once each year are standards such as "White Christmas," "Easter Parade" and "Stardust."

Findings of Fact and Conclusions of Law

12. Radio station KPQ broadcasts 60,000 playings of musical compositions per year.

13. At all times here pertinent, responsible officers of defendant International Good Music, Inc. were aware of the catalog of copyright entries published by the United States Register of Copyrights and publicly available through the United States Superintendent of Documents.

14. At all times here pertinent, responsible officers of defendant International Good Music, Inc. never visited the office of the Secretary of State of the State of Washington in Olympia, Washington to examine the information there available concerning the copyright proprietors of the musical compositions to be performed on radio station KGMI. Responsible officers of defendant International Good Music, Inc. were aware that such information was available.

ASCAP

15. At all times here pertinent, each of the plaintiffs was and is now a member of the American Society of Composers, Authors and Publishers ("ASCAP").

16. ASCAP is an unincorporated membership association organized under the laws of the State of New York comprising over 8,000 author, composer and publisher members who own copyrights in various separate musical compositions.

17. The musical compositions in which the members of ASCAP own copyrights are commonly referred to as constituting its repertory.

Findings of Fact and Conclusions of Law

18. ASCAP is one of three music licensing organizations in the United States which among them license non-dramatic public performances for profit of substantially all of the copyrighted musical works in the United States. More than 50% of all performances of copyrighted music by broadcasting stations are performances of compositions which ASCAP members have created.

19. Each of the musical compositions here shown to have been infringed is now and at all times here pertinent was a part of the ASCAP repertory.

ASCAP AND ITS MEMBERS

20. The relationship between ASCAP and the plaintiffs and the other members of ASCAP is set forth in (a) the General Agreement; (b) the Television Agreement; (c) the ASCAP Articles of Association; (d) the Amended Final Judgment of March 14, 1950 entered in an action in the United States District Court for the Southern District of New York entitled "United States of America, plaintiff, against American Society of Composers, Authors and Publishers, defendant," Civil Action No. 13-95; and (e) the order of January 7, 1960 entered in the same action.

21. Pursuant to the terms and conditions of the documents referred to in Finding 20, each plaintiff, prior to the date of the alleged infringement, had granted to ASCAP the non-exclusive right to license non-dramatic public performances for profit of all the compositions written, composed or published by such plaintiff during the term of his or its membership in ASCAP, and had received the right to share in royalty distributions made by the Society.

Findings of Fact and Conclusions of Law

22. Notwithstanding the grant described in Finding 21, at all times here pertinent, each plaintiff retained and had the right to license public performances for profit of each of his or its musical compositions.

ASCAP'S LICENSING FUNCTION

23. The ASCAP repertory changes from day to day, and even from hour to hour, as new compositions are added, or old compositions fall into the public domain, or members resign.

24. In radio broadcasting, split second timing is necessary and musical compositions must be available to be put on the air quickly.

25. The licensing of public performances for profit of copyrighted musical compositions by licensing organizations such as ASCAP is the only practical way by which copyright proprietors may exercise their federally-granted right to license non-dramatic performances of their copyrighted compositions. No single copyright proprietor could deal individually with all would-be users of his copyrighted compositions, and it would be impossible for him to police the use of his copyrighted songs. Equally, most broadcasters and other users of copyrighted music could not deal separately with the thousands of copyright proprietors whose music they perform.

THE AMENDED FINAL JUDGMENT

26. ASCAP's licensing activity is regulated and controlled by the Amended Final Judgment of March 14, 1950.

Findings of Fact and Conclusions of Law

Under Section IX of the Amended Final Judgment, when any would-be user of any, some or all of the compositions in the ASCAP repertory applies in writing to ASCAP for a license, ASCAP is required to advise him of the fee which it deems reasonable for the license requested. The making of the written application operates automatically to license the applicant. If the parties are unable to agree upon a reasonable fee, the applicant may apply to the United States District Court for the Southern District of New York for determination of a reasonable fee. In any such proceeding, the burden is on ASCAP to establish the reasonableness of the fee which it has requested. During the pendency of the proceeding, the applicant's license continues in effect, provided he makes such interim payments as the Court may direct. Thus ASCAP has no power to fix license fees, since any would-be user has the absolute right to have the Court determine a reasonable license fee.

27. After a reasonable fee has been finally determined by the Court, Section IX(C) of the Amended Final Judgment requires ASCAP to offer a license at a comparable fee to all other applicants similarly situated who thereafter request a license.

28. Under Section IV(C) of the Amended Final Judgment, ASCAP is forbidden at all times, in its licensing, to discriminate "in license fees or other terms and conditions between licensees similarly situated".

29. Under Section VI of the Amended Final Judgment, ASCAP is prohibited from granting to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member or

Findings of Fact and Conclusions of Law

members in interest have requested ASCAP in writing to do so, or unless ASCAP, at the written request of the prospective user, shall have sent a written notice of the prospective user's request for a license to each such member at his last known address and such member shall have failed to reply within thirty days thereafter.

BROADCASTERS' USE OF SECTION IX OF THE
AMENDED FINAL JUDGMENT

30. Would-be users of ASCAP music have made extensive use of the provisions of Section IX of the Amended Final Judgment. Since 1950, radio and television broadcasters have regularly joined together in industry-wide committees for the purpose of negotiating licenses with ASCAP. Whenever such negotiations have been unsuccessful, the broadcasters have exercised the rights conferred by Section IX and commenced Court proceedings for determination of reasonable license fees. Defendants herein have never been members of or connected with such industry-wide committees.

CHAPTER 19.24, R. C. W.

31. Chapter 19.24, R. C. W., was enacted by the Legislature of the State of Washington in 1937.

32. Section 19.24.020, R. C. W. provides:

“Unlawful combinations—Per piece royalties—Parting with right to restrict use. It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without

Findings of Fact and Conclusions of Law

the state, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: *Provided, further,* This chapter shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further,* Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this chapter does business, and all groups and persons affected by this chapter, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided, further,* Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works."

Findings of Fact and Conclusions of Law

33. Section 19.24.040, R. C. W. provides:

“Listing of pooled copyrighted works required. In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire, federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the secretary of state of the state of Washington, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or association, foreign or domestic shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classifications, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work. The secretary of state shall require two copies of said list, one of which he shall keep on file, the other shall be forwarded to the office of the state treasurer at Olympia.”

Findings of Fact and Conclusions of Law

34. Section 19.24.050, R. C. W. provides:

“Lists of copyrighted works—Open to public—Publication provided for. The foregoing list of names and titles, provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall, if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a newspaper of general circulation, in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws.”

35. Section 19.24.055, R. C. W. provides:

“Filing required of nonresident and foreign copyright holders—Exception. No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this chapter, if their music or copy-

Findings of Fact and Conclusions of Law

righted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: *Provided, however,* Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or groups, or association of persons, as prohibited by this chapter, need not file any such list."

36. Section 19.24.060, R. C. W. provides:

"Declaration of purpose of legislation—Situs of copyrighted work. It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether originating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices, and to prevent extortion, to encourage free bargaining between

Findings of Fact and Conclusions of Law

the citizens of this state with each other and with those without the state, and in order to give greater effect to the constitutional provisions relating to monopoly and price fixing, and in the general interest of the public, therefor, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this chapter, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state from points within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentalities in the furtherance of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this chapter and of the State Constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this chapter shall be deemed to have used

Findings of Fact and Conclusions of Law

their property within this state in such a way that the same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: *Provided, further*, The legal situs of any copyrighted work is coextensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the state of Washington."

37. Section 19.24.290, R. C. W. provides:

"Violations—Penalties. Every person, in addition to the other penalties provided in this chapter, who violates or who procures, or aids or abets in the violating of any provision of this chapter, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this chapter, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this chapter, or to render ineffectual any valid order of any court in connection with the enforcement of this chapter shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail for not more than six months, or both such fine and imprisonment."

Findings of Fact and Conclusions of Law

THE 1959 WASHINGTON SECTION IX PROCEEDING

38. In 1958, certain broadcasters in the State of Washington stopped paying fees to ASCAP under existing license agreements on the alleged ground that payment of such license fees would violate Ch. 19.24, R. C. W.

39. The license agreements referred to in Finding 38 expired on December 31, 1958.

40. In 1959, a group of broadcasters, including eleven broadcasters located in the State of Washington, commenced a proceeding in the United States District Court for the Southern District of New York under Section IX of the Amended Final Judgment for determination of reasonable fees for licenses to be effective as of January 1, 1959.

41. In that proceeding, the Court ruled that, in the circumstances presented, ASCAP would not be directed to issue licenses to any petitioning broadcasters in the State of Washington.

42. Thereafter, and until November 20, 1959, ASCAP did not offer licenses to broadcasters in the State of Washington.

43. On November 20, 1959, the owners of 61 Washington radio stations filed a petition in the United States District Court for the Southern District of New York asking that Court to issue an order

“(a) directing ASCAP to grant to petitioners and others similarly situated who may join herein, licenses for the right of public performance of

Findings of Fact and Conclusions of Law

compositions in the ASCAP repertory by the radio and television stations operated by them within the State of Washington;

“(b) determining and establishing the terms and conditions of such licenses.”

44. At the request and with the consent of the petitioners, the Court (Ryan, C. J.) entered an order on November 20, 1959 directing ASCAP to issue licenses to the petitioners in one of two specified forms for the period January 1, 1959 through December 31, 1963. The Court ruled:

“6. Taking into consideration the provisions of the Amended Final Judgment herein, the regulation of the activities of the respondent thereunder and the scope of its activities pursuant thereto, and giving due regard to the enactment of Revised Code of Washington, C. 19.24—Laws of 1937, C. 218, the licenses which the Society is hereby directed to issue may lawfully be entered into between respondent and petitioners, and respondent is hereby directed to enter into such license agreements with each of the petitioners.

“7. The provisions in said agreements for the disposition of claims for the period prior to June 1, 1959 are reasonable and do not discriminate against other users in the State of Washington or other states.”

45. The two specified license forms were the so-called “blanket” and “per program” radio licenses. Both licenses

Findings of Fact and Conclusions of Law

grant the licensee the right to perform whatever ASCAP music he desires, whenever he desires. Under the blanket license, the fee charged is 2.125% of the licensee's over-all revenues from sale of time on the air, after extensive deductions. Under the per program license, the licensee pays a higher percentage, but the fee is based only on the revenues from programs on which compositions in the ASCAP repertory are performed.

DEFENDANTS' REFUSAL TO TAKE LICENSES

46. Defendants were fully apprised of the proceedings before Judge Ryan.

47. The license forms established by the order of November 20, 1959, were available to defendants.

48. Defendants failed to apply for or execute either form of license.

LICENSING ACTIVITY OF ASCAP AND PLAINTIFFS
IN WASHINGTON

49. The only licenses issued by ASCAP to broadcasters in the State of Washington now or at the time of infringement are licenses in the forms annexed to the order of November 20, 1959.

50. Plaintiffs have at all times in the last ten years been ready to negotiate with any broadcaster in the State of Washington for a license to perform any of plaintiffs' copyrighted musical compositions on any mutually agreeable basis, including "rates assessed on a per piece system

Findings of Fact and Conclusions of Law

of usage." In the last ten years, no broadcaster in the State of Washington has requested such a license from any plaintiff. No defendant has ever made any attempt to contact any plaintiff individually for the purpose of obtaining licenses to play any of plaintiffs' compositions on a "per piece" or any other basis.

51. In the last ten years, ASCAP has not received any request from any broadcaster in the State of Washington and any ASCAP member in interest for the issuance of a license to perform one or more specified compositions.

COMPLIANCE WITH WASHINGTON LAW (R. C. W. § 19.24)

52. In each of the last three years, in attempted compliance with R. C. W., §§ 19.24.040, 19.24.050, 19.24.055 on behalf of plaintiffs and other members, ASCAP has filed with the Secretary of State of the State of Washington a catalog of its members' copyrighted musical compositions, together with forms of licenses available to all would-be users in the State of Washington. No public official of the State of Washington has requested ASCAP to make any change in either the form or substance of ASCAP's filings. Specifically, no Washington public official has made any complaint that ASCAP's per program license does not assess rates on a per piece system of usage.

53. In making the filings referred to in Finding 52, ASCAP relied on and was guided by a letter dated August 23, 1948, from the Attorney General of the State of Washington to the Secretary of State of the State of Washington (of which ASCAP received a copy) in which the Attorney General stated that in his opinion the filing made by

Findings of Fact and Conclusions of Law

ASCAP in the office of the Secretary of State on April 20, 1948 was in compliance with Chapter 19.24, R. C. W.

54. At all times here pertinent, plaintiffs have received royalties for the publication of their copyrighted musical compositions which are usually paid according to the number of sales of individual sheet music or records.

55. ASCAP is paying the expenses connected with the prosecution of all actions now pending in Washington for infringement of copyright of compositions in the ASCAP repertory in which the firm of Holman, Marion, Black, Perkins & Coie represents plaintiffs.

56. ASCAP selected and retained the law firm of Paul, Weiss, Rifkind, Wharton & Garrison of New York as attorneys of counsel for the plaintiffs in said actions.

57. ASCAP arranged to obtain the information in the complaints that defendants performed the musical compositions alleged to have been infringed.

58. ASCAP has continued since the date of the alleged infringements to have people or organizations in the State of Washington monitor unlicensed broadcasting stations for possible copyright infringements.

59. Said monitoring was done at ASCAP's request.

60. ASCAP has authority to commence these actions on behalf of plaintiffs.

61. ASCAP has authority to commence other suits for alleged copyright infringement of musical compositions in ASCAP's repertory held by the plaintiffs.

Findings of Fact and Conclusions of Law

62. ASCAP has authority to arrange for settlement of such actions.

63. In the past year and one-half, plaintiffs and other members of ASCAP have brought 15 suits against 11 radio stations in Washington, alleging 272 infringements.

64. ASCAP, through its agents and legal representatives, has at all times pertinent hereto advised infringing broadcasting stations, including defendants, that performances by such stations of copyrighted musical compositions in the Society's repertory would constitute infringement of such copyrights unless the prior consent of the individual owners of performing rights in such compositions or of the Society had been obtained.

THREATS OF PROSECUTION UNDER CH. 19.24, R. C. W.

65. Neither defendant Jones nor any officer of any defendant corporation has ever been threatened with prosecution under Chapter 19.24, R. C. W. There is no evidence that any broadcaster in the State of Washington has ever been so threatened, although the majority of Washington broadcasters have taken licenses from ASCAP, have paid royalties and have publicly participated in judicial proceedings to obtain such licenses.

66. Defendants' failure to take licenses from ASCAP was not because they feared prosecution under Chapter 19.24 R. C. W. Defendants failed to take licenses only because they wanted to avoid paying license fees on the same basis charged to—and paid by—other broadcasting companies.

Findings of Fact and Conclusions of Law

MISCELLANEOUS

67. Under Section XV of the Amended Final Judgment, membership in ASCAP is open to all qualified persons and ASCAP is not permitted to deny membership to any such person because of affiliation with any record company.

68. Some corporate plaintiffs, and other corporate members of ASCAP, are subsidiaries of or otherwise affiliated with record companies.

69. Each member of ASCAP may assign or license performing rights to recording companies.

70. Most phonograph records are marked as to the name of the licensing organization that is authorized to license the music contained on the record; virtually all records are marked to show the names of the writers and publishers; copies of ASCAP's membership list are publicly available.

71. Recording companies generally acquire only the recording rights to musical compositions as distinguished from the performing rights.

72. At the time of the alleged infringement and now, there were and are no licenses in effect between ASCAP or any plaintiff and any recording company authorizing any broadcasting station to perform publicly for profit any musical composition.

73. ASCAP has never offered any such license to recording companies nor has any such license ever been requested.

Findings of Fact and Conclusions of Law

74. None of the plaintiffs has ever offered any such license to recording companies nor has any such license ever been requested.

75. There is no evidence that plaintiffs or other members of ASCAP have entered into a conspiracy to prevent recording companies from obtaining licenses authorizing broadcasting stations to perform publicly for profit any musical composition.

76. License agreements between ASCAP and radio networks license affiliated stations to perform compositions in the ASCAP repertory on network programs, but do not authorize local stations affiliated with the networks to perform compositions in the ASCAP repertory on non-network programs.

77. No part of the license fees paid to ASCAP by any radio network is for public performance of compositions in the ASCAP repertory on non-network programs.

DAMAGES

78. The Court finds the following awards of damage appropriate in light of the circumstances here presented and in the exercise of its discretion:

a) \$350 for each infringement, or a total of \$1,750 in *Tempo Music, Inc. et al. v. International Good Music, Inc.*, Civil Action No. 5548;

b) \$350 for each infringement, or a total of \$21,000 in *Irving Berlin, et al. v. International Good Music, Inc.*, Civil Action No. 5773;

Findings of Fact and Conclusions of Law

c) \$350 for each infringement, or a total of \$25,200 in *Cole Porter, et al. v. Rogan Jones and International Good Music, Inc.*, Civil Action No. 242 (Bellingham), both defendants to be jointly liable for all such damages;

d) \$250 for each infringement, or a total of \$1,000 in *Gershwin Publishing Corporation et al. v. K-91, Inc.*, Civil Action No. 5771;

e) \$250 for each infringement, or a total of \$3,500 in *Irving Berlin, et al. v. Wescoast Broadcasting Co.*, Civil Action No. 2258; and

f) \$250 for each infringement or a total of \$7,000 in *Betty Comden, et al. v. Wescoast Broadcasting Co.*, Civil Action No. 2415.

79. The Court finds that plaintiffs are entitled to reasonable attorneys' fees, as part of the costs, in the amount of \$15,000., to be allocated among the cases in accordance with the amount of statutory damages allowed in each case.

CONCLUSIONS OF LAW

1. The Court has jurisdiction over plaintiffs' claims for copyright infringement under the federal copyright law and of defendants' counterclaims under the federal anti-trust laws and Washington law.

2. Defendants infringed plaintiffs' copyrighted musical compositions by performing the compositions publicly for profit without the consent of the copyright owner or of anyone else who had the right to license public performances for profit of the compositions.

Findings of Fact and Conclusions of Law

3. During the last ten years, defendants have committed numerous other infringements of plaintiffs' copyrighted musical compositions and of the copyrighted musical compositions of other authors, composers and publishers.

4. Defendant Jones is liable for the copyright infringements complained of in *Cole Porter, et al. vs. Rogan Jones and International Good Music, Inc.*, Civil Action No. 242 (Bellingham).

5. Defendants' defenses based upon Ch. 19.24, R. C. W., are without merit and cannot be used to defeat plaintiffs' claims for copyright infringement.

6. In consequence of ASCAP's filings with the Secretary of State of the State of Washington in each of the last three years, ASCAP and its members have fully complied with the provisions of § 19.24.040, 19.24.050 and 19.24.055, R. C. W.

7. By bringing lawsuits against infringing broadcasters in the State of Washington, neither plaintiffs nor other ASCAP members have violated § 19.24.060, R. C. W. No abuse of Federal or State process results from plaintiffs' bringing the present actions to compel infringing broadcasters to honor plaintiffs' rights under the Copyright Law nor from writing letters demanding that their rights be respected.

8. Plaintiffs have not lost the right to restrict performances of their copyrighted works by reason of § 19.24.020, R. C. W. Plaintiffs' grant to ASCAP of a non-exclusive right to license public performances is not a

Findings of Fact and Conclusions of Law

sale of the right to the single use of such copyrighted work within the meaning of § 19.24.020, R. C. W. In addition, the sole value of plaintiffs' copyrighted works is not in their use for public performances for profit. Plaintiffs receive substantial royalties for the publication of their works in sheet music, for recordings, and for other uses.

9. Plaintiffs and other ASCAP members have not pooled their separate copyrighted interests in ASCAP for the purpose of fixing prices in violation of § 19.24.020, R. C. W. While ASCAP's members grant to ASCAP a non-exclusive right to license, each member retains the right to deal on his own behalf.

10. Section 19.24.020, R. C. W. permits "pooling" if the participants in the pool "issue licenses on rates assessed on a per piece system of usage."

11. The ASCAP "per program" license may reasonably be regarded as assessing rates "on a per piece system of usage" as the Washington statute uses that phrase. The willingness of ASCAP's individual members to negotiate for licenses containing rates assessed on a per piece system of usage also constitutes compliance with the statute.

12. ASCAP and its members fully comply with the requirements of § 19.24.020, R. C. W.

13. Defendants' contentions as to the requirements of Ch. 19.24., R. C. W., would deprive plaintiffs and all other copyright owners of their federally granted property rights.

14. To construe the provisions of Ch. 19.24., R. C. W., so as to make the acts of the plaintiffs or ASCAP in these

Findings of Fact and Conclusions of Law

cases unlawful, would raise grave questions concerning the constitutionality of the Washington statute under the Fourteenth Amendment to the Constitution of the United States.

15. Defendants' defenses and counterclaim based on the federal antitrust laws are without merit.

16. Plaintiffs have not unlawfully extended their copyright monopolies through a combination among themselves or with ASCAP, nor are they guilty of violating the federal antitrust laws in any respect alleged by defendants or otherwise.

17. In view of the rights granted to defendants by Section IX of the Amended Final Judgment, defendants cannot complain that they have been damaged or prejudiced by ASCAP's conduct.

18. Neither plaintiffs nor other members of ASCAP have entered into a conspiracy to prevent recording companies from obtaining licenses authorizing any broadcasting station to perform publicly for profit any musical composition.

19. Even if plaintiffs' conduct in any respect could be considered a violation of either Washington law or the federal antitrust laws, such violations are so minimal and the violations of the defendants so unconscionable that plaintiffs should not be deprived of the right to maintain these actions for the deprivation of their property.

Findings of Fact and Conclusions of Law

20. In accordance with 17 U. S. C. § 101, and in the exercise of the Court's discretion, plaintiffs are entitled to the following damages:

a) \$350 for each infringement, or a total of \$1,750 in *Tempo Music, Inc. et al. v. International Good Music, Inc.*, Civil Action No. 5548;

b) \$350 for each infringement, or a total of \$21,000 in *Irving Berlin, et al. v. International Good Music, Inc.*, Civil Action No. 5773;

c) \$350 for each infringement, or a total of \$25,200 in *Cole Porter, et al. v. Rogan Jones and International Good Music, Inc.*, Civil Action No. 242 (Bellingham), both defendants to be jointly liable for all such damages;

d) \$250 for each infringement, or a total of \$1,000 in *Gershwin Publishing Corporation et al. v. K-91, Inc.*, Civil Action No. 5571;

e) \$250 for each infringement, or a total of \$3,500 in *Irving Berlin, et al. v. Westcoast Broadcasting Co.*, Civil Action No. 2258; and

f) \$250 for each infringement or a total of \$7,000 in *Betty Comden, et al. v. Westcoast Broadcasting Co.*, Civil Action No. 2415.

21. Plaintiffs are also entitled to reasonable attorneys' fees, as part of the costs. The attorneys' fees are fixed in the amount of \$15,000 to be allocated among the cases in accordance with the amount of statutory damages allowed in each case.

Findings of Fact and Conclusions of Law

22. Plaintiffs are also entitled to an injunction restraining defendants from future infringement of plaintiffs' copyrighted musical compositions.

/s/ GUS J. SOLOMON
U. S. D. J.

Dated: January 18, 1965

I hereby certify that the annexed instrument is a true and correct copy of the original on file in my office.

ATTEST: HAROLD W. ANDERSON
Clerk, U. S. District Court
Western District of Washington

By BETTY ROUGHTON
Deputy Clerk

[SEAL]

Appendix B

Chapter 19.24

COPYRIGHT PROTECTION

Sections

- 19.24.010 Performance, selling, of copyrighted music or drama forbidden, when.
- 19.24.020 Unlawful combinations—Per piece royalties—Parting with right to restrict use.
- 19.24.030 Copyright pools—Royalties on piece system.
- 19.24.040 Listing of pooled copyrighted works required.
- 19.24.050 Lists of copyrighted works—Open to public—Publication provided for.
- 19.24.055 Filing required of nonresident and foreign copyright holders—Exception.
- 19.24.060 Declaration of purpose of legislation—Situs of copyrighted work.
- 19.24.070 Declaration of police power.
- 19.24.080 Purpose of legislation.
- 19.24.090 Situs of copyrighted work.
- 19.24.100 Doing business defined—Amenability to process—Service on nonresidents.
- 19.24.110 Doing business in this state—Evidence of.
- 19.24.120 Process—Secretary of state as agent.
- 19.24.130 Process—Service upon nonresident.
- 19.24.140 Injunction—Receivership—Anti-monopoly board—Escheat.
- 19.24.150 Injunction—To whom to be applicable.
- 19.24.160 Injunction—Enforcement—Receiver.
- 19.24.170 Receivership—Scope.
- 19.24.180 Receivership—Collection of disputed license fees.
- 19.24.190 Anti-monopoly board—Convening by court, when.
- 19.24.200 Anti-monopoly board—Membership—Duties.
- 19.24.210 Receiver—License fees fixed by board.
- 19.24.220 Receiver—Term of administration.
- 19.24.230 Receiver—Attorney—Fees.

Appendix B

Sections

- 19.24.240 Escheat of copyrights to state—Order to show cause.
- 19.24.250 Escheat of copyrights—Procedure.
- 19.24.260 Escheat—Recording by receiver—Disposition.
- 19.24.270 Escheated property—Biennial reports by treasurer.
- 19.24.280 Special appearances deemed general.
- 19.24.290 Violations—Penalties.
- 19.24.300 Concurrent injunctions or receiverships.
- 19.24.900 Severability—General repealer.

19.24.010 *Performance, selling, of copyrighted music or drama forbidden, when.* It shall be unlawful for any person who, without the consent of the owner thereof, shall cause to be publicly performed for profit any dramatic composition, or dramatic musical composition commonly called an opera, or other copyrighted works, or any substantial part thereof, which has been copyrighted under the laws of the United States, or for any person to knowingly participate in the performance or representation of any substantial part thereof, or by knowingly selling a substantial copy or any substantial part thereof. [1937 c 218 § 2; RRS § 3802-1.]

19.24.020 *Unlawful combinations—Per piece royalties—Parting with right to restrict use.* It shall be unlawful for two or more persons holding or claiming separate copyrighted works under the copyright laws of the United States, either within or without the state, to band together, or to pool their interests for the purpose of fixing the prices on the use of said copyrighted works, or to pool their separate interests or to conspire, federate, or join together, for the purpose of collecting fees in this state, or to issue blanket licenses in this state, for the right to commercially

Appendix B

use or perform publicly their separate copyrighted works: *Provided, however,* Such persons may join together if they issue licenses on rates assessed on a per piece system of usage: *Provided, further,* This chapter shall not apply to any one individual author or composer or copyright holder or owner who may demand any price or fee he or she may choose for the right to use or publicly perform his or her individual copyrighted work or works: *Provided, further,* Such per piece system of licensing must not be in excess of any per piece system in operation in other states where any group or persons affected by this chapter does business, and all groups and persons affected by this chapter, are prohibited from discriminating against the citizens of this state by charging higher and more inequitable rates per piece for music licenses in this state than in other states: *Provided, further,* Where the owner, holder, or person having control of any copyrighted work has sold the right to the single use of said copyrighted work, where its sole value is in its use for public performance for profit, and has received any consideration therefor, either within or without the state, then said person or persons shall be deemed to have sold and parted with the right to further restrict the use of said copyrighted work or works. [1937 c 218 § 3; RRS § 3802-2. Formerly RCW 19.24.020 and 19.24.030.]

19.24.030 *Copyright pools—Royalties on piece system.* [1937 c 218 § 3, part; RRS § 3802-2, part.] Now codified in RCW 19.24.020.

19.24.040 *Listing of pooled copyright works required.* In the event two or more persons holding separate copyrighted musical works, or any rights flowing therefrom, whether by assignment, agency agreements, or by any form of agreement, pool their interests, or combine, or conspire,

Appendix B

federate, or join together in any way, whether for a lawful purpose or otherwise, a complete list of their copyrighted works or compositions shall be filed once each year in the office of the secretary of state of the state of Washington, together with a list of the prices charged or demanded for their various copyrighted works; no payment or filing fee shall be required by the secretary of state, and said persons, corporations, or association, foreign or domestic shall state therein under oath, that said list is a complete catalogue of the titles of their claimed compositions, whether musical or dramatic or of any other classification, and in addition to stating the name and title of the copyrighted work it shall recite therein the date each separate work was copyrighted, and the name of the author, the date of its assignment, if any, or the date of the assignment of any interest therein, if any, and the name of the publisher, the name of the present owner, together with the addresses and residences of all parties who have at any time had any interest in such copyrighted work. The secretary of state shall require two copies of said list, one of which he shall keep on file, the other shall be forwarded to the office of the state treasurer at Olympia. [1937 c 218 § 4; RRS § 3802-3. FORMER PART OF SECTION: 1937 c 218 § 6; RRS § 3802-5, now codified as RCW 19.24.055.]

19.24.050 *Lists of copyrighted works—Open to public—Publication provided for.* The foregoing list of names and titles, provided for in the preceding section, shall be made available by the secretary of state to all persons for examination, in order that any user of copyrighted works in this state may know the rights and the titles to such copyrighted works as may be claimed by any of said combinations, pools, associations, or persons as aforesaid; said lists shall be prepared so that all persons may avoid using said copyrighted

Appendix B

compositions, if they so desire, and may avoid conflict therewith, and avoid committing innocent infringements of said works; and in order to further effectuate the copyright laws of the United States, the secretary of state shall, if he deems it necessary to protect the citizens of this state from committing innocent violations of the copyright laws of the United States, publish such list once each year in a newspaper of general circulation, in order that all citizens of the state may respect any and all individual rights granted by the United States copyright laws. [1937 c 218 § 5; RRS § 3802-4.]

19.24.055 *Filing required of nonresident and foreign copyright holders—Exception.* No person, corporation, or association, domestic or foreign, whether doing business in this state as hereinafter defined or not, shall be absolved from the foregoing duty of filing said list of holdings as required in the preceding sections of this chapter, if their music or copyrighted works are used commercially in this state, or have been used herein, whether originating from a point within the state or from without, and as long as any rendition thereof is received or heard within the state, or is intended to be so received by the originator of any musical program: *Provided, however,* Any individual owner of a copyrighted work or works, not a party to or not connected in any way with any pool, conspiracy, combination, or groups, or association of persons, as prohibited by this chapter, need not file any such list. [1937 c 218 § 6; RRS § 3802-5. Formerly RCW 19.24.040, part.]

19.24.060 *Declaration of purpose of legislation—Situs of copyrighted work.* It is hereby declared that the production and creation of music and the commercial use of music and of copyrighted works within this state, whether origi-

Appendix B

nating at a point from within or without the state, as long as the same shall be rendered and publicly received within the confines of this state, whether mechanically or by radio communication, is a business clothed and affected with the public interest, and the adult educational advantages engendered by the public use of music and in its creation, makes this business one of public necessity, and necessary for the education and training of the youth of this state; that many abuses are practiced under a false guise of federal protection which only the state with its police power can easily and lawfully restrain, and in order to prohibit, discourage, and prevent monopolistic practices, and to prevent extortion, to encourage free bargaining between the citizens of this state with each other and with those without the state, and in order to give greater effect to the constitutional provisions relating to monopoly and price fixing, and in the general interest of the public, therefore, the legislature in the interest of the peace and dignity of the state, in the interest of good morals and the general welfare of the people of this state, and for greater educational advantages to the public, declares that said business shall be subject to the police power and reasonable regulation of the state government, and such police and regulating power shall be administered by the courts and other officials of this state in a manner consistent with, in aid of, and never in conflict with, the copyright laws of the United States. The provisions of this chapter, and the administration thereof, shall at all times effectuate the enforcement, the true intent, and meaning of the United States copyright laws in order to prevent abuses from being practiced within this state from points within or from points without the state, by any individual, corporation, or organizations, who attempt to use the federal courts as innocent instrumentalities in the furtherance

Appendix B

of any systematic campaign or scheme designed to illegally fix prices for the commercial use of copyrighted works in this state through the use of extortionate means and terrorizing practices based on threats of suits, and an abuse of both state and federal process, all of which are declared to be in violation of this chapter and of the state Constitution; it is further declared that any person or persons, or combines, as aforesaid, who shall violate this chapter shall be deemed to have used their property within this state in such a way that the same shall have acquired a legal situs, analogous to the situs of other personal tangible property within the state, even though separate from the domicile and residence of the owner: *Provided, further*, The legal situs of any copyrighted work is coextensive about the state, and a copyrighted work used or sold for public use or public performance for profit, if intended to be heard from a point without the state or from a point within the state, is hereby declared to be a commercial commodity, and its legal situs is hereby declared to be within the state of Washington. [1937 c 218 § 7; RRS § 3802-6. Formerly RCW 19.24.060 through 19.24.090.]

19.24.070 *Declaration of police power.* [1937 c 218 § 7, part; RRS § 3802-6, part.] Now codified in RCW 19.24.060.

19.24.080 *Purpose of legislation.* [1937 c 218 § 7, part; RRS § 3802-6, part.] Now codified in RCW 19.24.060.

19.24.090 *Situs of copyrighted work.* [1937 c 218 § 7, part; RRS § 3802-6, part.] Now codified in RCW 19.24.060.

19.24.100 *Doing business defined—Amenability to process—Service on nonresidents.* All persons, groups,

Appendix B

corporations, associations, foreign or domestic, violating this chapter, shall be deemed to have been doing business within this state and amenable to the process of the state courts, when any such persons, combinations, or groups shall have issued licenses, either from within or from without the state, for the privilege of using commercially and publicly any copyrighted work or works pooled in a common group or entity, or when any of the functions of said entity, organization, pool, or combine, is or has been performed in this state; and the business of spying upon and the warning of users of the copyrighted works of such combinations, in addition to the presence within the state of such persons, and the activities of such persons or their agents at any time or occasion for the detection of infringements within this state, shall be conclusive evidence that such combinations and persons, even though nonresidents, have accepted the privileges of doing business within this state, and such persons, if they abide by the provisions of this chapter, shall be granted the privilege of conducting business within this state in a legal manner, and may invoke the benefits of the state government and its political subdivisions in their behalf, and they may use all of the privileges available to the citizens of this state in general, and the use at any time of any general privilege available to any citizen of this state, by any of such agents, their attorneys, or representative, or investigator, or by any aider and abettor, or any nonresident person, group, entity, or combination as aforesaid, shall be deemed to be an acceptance of the provisions of this chapter; and all licensees of any violator of this chapter shall be deemed as aiders and abettors of said persons and subject to the provisions of this chapter unless they forthwith indicate their obedience herewith; and the acceptance of the general

Appendix B

privileges of the state of Washington by any nonresident copyright holder or owner, or combination, defendant, or person, or organization of any kind, or entity, through an investigator, attorney, agent, representative, or through any aider and abettor as herein defined, and the acceptance by such persons of the rights, police protection, or of any general privilege conferred by the law of this state to any of its citizens, including the use of the roads and highways, or the privileges of any of its political subdivisions, as evidenced by their presence within the state at any time; shall be deemed equivalent to and construed to be an appointment by such nonresident or nonresidents, as the case may be, of the secretary of state of the state of Washington to be his or their true and lawful attorney upon whom may be served all summons and processes against him or them and growing out of a violation of this chapter, in which said nonresident may be involved, and said acceptance of the privileges of this state, as aforesaid, shall be a signification of his or their agreement that any summons or process against him or them which is so served shall be of the same legal force and validity as if served on him or them personally within the state of Washington. Service of such summons or process shall be made by leaving a copy thereof with a fee of two dollars with the secretary of the state of Washington, or in his office, and such service shall be sufficient and valid personal service upon any such nonresident defendant, copyright holder or owner, persons, or defendants, combination, entity, or organization, as aforesaid: *Provided*, That notice of such service and a copy of the summons of process shall be forthwith sent by registered mail requiring personal delivery, by the prosecutor bringing any action under this chapter, to any defendant at his last known address, and the defendant's return re-

Appendix B

ceipt and the prosecutor's affidavit of compliance herewith are appended to the process and entered as a part of the return thereof: *Provided, further*, The court in which any action is brought may order such continuances as may be necessary to afford any nonresident defendant or groups, or entity, a reasonable opportunity to defend the action: *Provided, further*, The secretary of state shall keep a record of all such summons and process which shall show the day and time of service; and valid personal service shall thus be had on nonresident persons or individuals, entities, firms, or corporations violating this chapter. [1937 c 218 § 8; RRS § 3802-7. Formerly RCW 19.24.100 through 19.24.130.]

19.24.110 *Doing business in this state—Evidence of*. [1937 c 218 § 8, part; RRS § 3802-7, part.] Now codified in RCW 19.24.100.

19.24.120 *Process—Secretary of state as agent*. [1937 c 218 § 8, part; RRS § 3802-7, part.] Now codified in RCW 19.24.100.

19.24.130 *Process—Service upon nonresident*. [1937 c 218 § 8, part; RRS § 3802-7, part.] Now codified in RCW 19.24.100.

19.24.140 *Injunction — Receivership — Anti-monopoly board—Escheat*. In the event any person, or groups of persons, or any combination or pool as aforesaid, whether a nonresident corporation, person, or an association, or domestic, refuse to abide by the provisions hereof, or attempt to evade or render ineffectual the true enforcement of any provision of this chapter, then the prosecuting attorney of any county where complaint is made of any violation, shall institute injunction proceedings against said

Appendix B

persons in the superior court, and valid personal service may be had upon any nonresident defendant as set forth in RCW 19.24.100; and the court shall enjoin all persons from violating the provisions of this chapter and the constitutional provisions prohibiting price fixing, monopolies, and combinations, and all copyrighted works and the public performance rights thereto when sold or used for profit are hereby declared to be a commercial commodity, and all persons, aiders and abettors, and agents, shall be enjoined by the court from aiding or furthering in any way a continuation of any violation of this chapter, either by the payment of money to said defendants or in any way; and if any defendant or defendants persist in defying the judgment of the court, the court shall, in order to effectuate its judgment and orders, order three days' notice to be given said defendant or defendants, as the case may be, by having a copy of such notice served on the secretary of state as heretofore provided if defendants are without the state, or served personally if within the state, and have the same published in some daily paper in the state of general circulation, and at the end of said period, if any defendant or defendants refuse to obey the order of the court, then the court shall appoint the county auditor as receiver for the copyrighted works and property of defendants, tangible or intangible, and of all other effects and moneys derived therefrom, and the receiver shall take over and preserve the commercial rights to all of said copyrighted works, together with such other property of any defendant, combination, pool, corporation, or entity through which they are acting, that he can locate within the state, and the receiver shall administer the same under the direction of the court, and said receivership shall be considered only as an incident to the main injunction suit

Appendix B

of the prosecutor, and for the purpose of enforcing the court's orders; the said receiver shall seize the copyrighted works of all of the copyright holders and owners in said defendant combination, including all of the rights to suits for infringement and damages in both state and federal courts, and all choses of action, and all sums due on contracts and licenses, and hold the same subject to the order of the court; and all persons holding licenses or contracts with any defendant combination or entity, shall pay the fees and sums due thereon to the receiver for such time as the court may need to effectuate the provisions of this chapter, and to compel any defendant to abide herewith: *Provided*, Any sums paid on licenses violating this chapter shall only be continued in the court's discretion or until such time as the court can award defendants complete and full due process of law before entering a final order thereon, or until such time as a legal and equitable system of licensing can be determined according to the subsequent provisions of this chapter: *Provided further*, In the event any defendant or defendants attempt to withdraw their said copyright works or property from the state in order to violate and render this chapter or the court's order ineffectual, or to deprive the citizens of this state of such commodity, or to hamper the enforcement of any provision of this chapter, or to injure any citizen or user of music in any way, then the court shall immediately order the receiver to compile a complete list of all of the copyrighted works of said defendants which have been used in this state, and the court shall then convene the state anti-monopoly board, as herein now created, consisting of the state treasurer and the state auditor, and said board shall meet in the county where the suit is filed, and the superior judge hearing the cause shall be an advisory member of said board; and said board, of

Appendix B

which the state treasurer shall be chairman, shall have only one function, the discouragement of price fixing and monopolies, and the court shall then submit to said board the single question of the establishment of license rates for the use of those copyrighted works controlled by the defendants so proceeded against; and for the purpose of aiding in the abolition of monopolies and price fixing, and preventing violations of this chapter, the board shall determine a fair and just rate that the receiver should charge for the single and separate public performance for profit of each copyrighted work or works of said defendants, on a per piece system and basis of licensing, and the court shall not be deemed thereby to have divested itself of any of its jurisdiction by so doing; after determining such rate, the said anti-monopoly board shall immediately advise the receiver of its findings, and of its fair rate, and the same shall be filed of record in the cause, and the receiver may then, if said finding is approved by the court, issue licenses for the use of said music at such approved rate on a basis of so much money per each time a piece of music is played or used in a public performance for profit; that said property shall be thus administered by the receiver for a period of one year, or until such time as the defendants, or the individual copyright owners of any combination so proceeded against take oath that they will abide by the rulings of the court and the provisions of this chapter; and all fees and funds collected by the receiver shall be turned over to the state treasurer, and no receiver's fees or attorney's fees shall be allowed, and the prosecuting attorney shall be the attorney for the receiver, and the state treasurer shall keep said money in a separate and special fund, subject to the order of the court only for whatever portion thereof that the court may order used to defray the actual expenses of the

Appendix B

board and the receivership; at the end of one year, if the defendants and copyright owners or holders in any combination thus proceeded against, continue to wilfully disobey the court's orders, then the court shall issue an order, which shall be published in three public places, to the effect that unless the defendants obey all of the orders of the court within ten days from the date of said order, that the court will proceed to permanently deprive said defendants and each of them of their property; and the court shall then order said defendants to show cause within ten days why they should not be involuntarily compelled to assign all of their copyrighted works to the receiver forthwith, and to show cause why all of the funds as collected in the manner aforesaid from licenses, together with all of the copyrighted works including the performing rights thereto of said defendants and members of said combine, should not escheat and be forfeited forever to the state of Washington, and be subject thereafter to administration by the state in the same manner as all other personal property belonging to the state of Washington; if any of said defendants and copyright holders, or owners, do appear before the end of said ten day period, and take oath that they will abide by the future orders of the court and the provisions of this chapter, then the court shall release their copyrighted works and order the state treasurer to return any and all of their money which has been received or seized: *Provided, however,* The court shall retain such jurisdiction over their persons for such time as the court may deem necessary to insure strict compliance with the terms of the court's judgment and the provisions of this chapter; if any of said defendants or copyright owners or holders shall ignore or refuse to obey the show cause order, as aforesaid, or fail to appear at the end of ten days as ordered

Appendix B

and abide by the court's judgment, then the court shall make an order and enter judgment to the effect that all of the copyrighted works, including the performing rights thereto, of said defendants and the members of any defendant combination, shall be construed as having been escheated and forfeited to the state of Washington, and the court shall thereupon appoint some officer of the court to execute an involuntary assignment of all the legal and equitable titles to all of the copyrighted works of each of each of said defendants and members of any defendant combination to the receiver, in the event the defendants or any of their members fail to execute a voluntary assignment, and the receiver shall immediately file said involuntary assignment at the United States Copyright Office at Washington, D. C.; and the court shall then order the receiver to close the estate, and turn the titles to said copyrighted works over by proper assignment from the receiver to the state treasurer of the state of Washington, who shall thereafter administer, issue licenses for the use of the same in a manner consistent with this chapter, and conserve the same as state personal property in his possession, and according to law; and any funds left in the state treasury from said receivership shall escheat and be forfeited to the state and become part of the general fund: *Provided, further,* The state treasurer shall make a report to the legislature on each biennium of the amount of money received from such licensing and the amount of property he has on hand through the enforcement of this chapter. [1937 c 218 § 9; RRS § 3802-8. Formerly RCW 19.24.140 through 19.24.270.]

Appendix B

19.24.150 *Injunction—To whom to be applicable.* [1937 c 218 § 9, part; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

19.24.160 *Injunction — Enforcement — Receiver.* [1937 c 218 § 9, part; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

19.24.170 *Receivership—Scope.* [1937 c 218 § 9, part; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

19.24.180 *Receivership—Collection of disputed license fees.* [1937 c 218 § 9, part; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

19.24.190 *Anti-monopoly board — Convening by court, when.* [1937 c 218 § 9, part; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

19.24.200 *Anti-monopoly board — Membership — Duties.* [1937 c 218 § 9, parts; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

19.24.210 *Receiver—License fees fixed by board.* [1937 c 218 § 9, part; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

19.24.220 *Receiver—Term of administration.* [1937 c 218 § 9, part; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

19.24.230 *Receiver—Attorney—Fees.* [1937 c 218 § 9, part; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

Appendix B

19.24.240 *Escheat of copyrights to state—Order to show cause.* [1937 c 218 § 9, part; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

19.24.250 *Escheat of copyrights—Procedure.* [1937 c 218 § 9, part; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

19.24.260 *Escheat—Recording by receiver—Disposition.* [1937 c 218 § 9, part; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

19.24.270 *Escheted property—Biennial reports by treasurer.* [1937 c 218 § 9, part; RRS § 3802-8, part.] Now codified in RCW 19.24.140.

19.24.280 *Special appearances deemed general.* That in the event any person, or any of the defendants, or non-residents, or nonresident copyright owners or holders, are proceeded against as herein outlined, and are served with process according to law, or any nonresident is served with process as outlined in the preceding sections of this chapter, and if any of said defendants, or persons, or aiders and abettors named as defendants, appear in any such proceeding by counsel or otherwise, or institute any special proceeding attacking such proceeding, or make any motion therein, either special or general, or if any of them appear to obtain the judgment of the court solely upon the sufficiency of the service of process upon them, or upon any phase or particularity of said injunction proceedings, such special proceeding or appearance, or motion, or appearance, as the case may be, shall nevertheless be deemed as a general appearance even though the process may have been insufficient, and said parties and defendants as may

Appendix B

thus appear in the action, for any reason or cause, whether they seek special or affirmative relief, shall thereafter be subject to the general orders and jurisdiction of the court for all purposes, and if any of said defendants or persons appear in any court proceeding instituted to effectuate this chapter solely for the purpose of challenging the validity of service of process upon them they shall be deemed to have surrendered themselves and as having submitted to the general jurisdiction of the court: *Provided, however,* This section shall not be construed as denying, and no attempt shall be made at any time in any proceeding in connection with the enforcement of this chapter, to restrain or deny any of said defendants, resident or non-resident, copyright holders or owners, or any person or members of any defendant combination, entity, pool, or monopoly of their rights or property without full and complete due process of law. [1937 c 218 § 10; RRS § 3802-9.]

19.24.290 *Violations—Penalties.* Every person, in addition to the other penalties provided in this chapter, who violates or who procures, or aids or abets in the violating of any provision of this chapter, or who conspires to render ineffectual any valid order or decision of any court in the enforcement of this chapter, or who procures, conspires with, or aids or abets any person or persons in his or their failure to obey the provisions of this chapter, or to render ineffectual any valid order of any court in connection with the enforcement of this chapter shall be deemed guilty of a gross misdemeanor, and upon conviction, shall be punished by a fine not exceeding five hundred dollars, or imprisonment in the county jail for not more than six months, or both such fine and imprisonment. [1937 c 218 § 11; RRS § 3802-10.]

Appendix B

19.24.300 *Concurrent injunctions or receiverships.* In the event more than one injunction suit provided for in this chapter is instituted in this state, in different counties by different prosecuting attorneys, but against the same defendants, the respective superior judges hearing the causes may issue orders against said defendants in any county, but in the event any of the various county proceedings enter into the state of receivership, as herein provided, then the judges hearing the respective causes shall order those causes where the defendants are the same, to be consolidated in one action in one particular county, and in such county as the judges may decide, to the end that only one receiver may be appointed for the entire state of the property of the same defendant or defendants. [1937 c 218 § 13; RRS § 3802-12.]

19.24.900 *Severability—General repealer.* In case any part or portion of this chapter shall be held unconstitutional, such holding shall not affect the validity of this chapter as a whole or any other part or portion of this chapter, and if any clause, sentence, paragraph, subdivision, section or part of this chapter shall for any reason be adjudged invalid, such judgment shall not affect, impair or invalidate the remainder of the chapter, but shall be strictly confined in its operation and holding to the specific clause, sentence, paragraph, subdivision, section, or part thereof, directly involved in the controversy in which such judgment shall have been rendered; and all other acts and laws in conflict herewith are hereby repealed. [1937 c 218 § 12; RRS § 3802-11.]



IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,

Plaintiff,

v.

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, et al.,

Defendants.

Civil Action
No. 13-95

AMENDED FINAL
JUDGMENT

Plaintiff having filed its complaint herein on February 26, 1941, the defendants having appeared and filed their answer to the complaint denying the substantive allegations thereof, all parties having consented, without trial or adjudication of any issue of fact or law therein, to the entry of a Civil Decree and Judgment, filed March 4, 1941, and jurisdiction having been retained in this Court pursuant to Section VI of said Civil Decree and Judgment for the purpose of granting such modifications of the Civil Decree and Judgment as may be necessary and appropriate; and

Plaintiff having moved the Court that said Civil Decree and Judgment should be modified in certain respects, and all parties hereto consenting to such modifications and the entry of this Amended Final Judgment,

Now, THEREFORE, no testimony having been taken and without trial or adjudication of any issue of fact or law herein and without admission by any defendant in respect of any such issue and upon consent of all parties hereto, it is hereby

ORDERED, ADJUDGED AND DECREED that the Civil Decree and Judgment of March 4, 1941 be amended to read as follows:

I. This Court had jurisdiction of the subject matter hereof and of all parties hereto with full power to enter this Judgment. The complaint states a cause of action against the defendants under Section 1 of the Act of Congress of July 2, 1890, entitled "An Act to Protect Trade and Commerce Against Unlawful Restraints and Monopolies," commonly known as the Sherman Act, as amended.

II. As used in this Judgment:

(A) "ASCAP" means the defendant American Society of Composers, Authors and Publishers;

(B) "Right of public performance" means the right to perform a copyrighted musical composition publicly for profit in a non-dramatic manner, sometimes referred to as "small performing right";

(C) "Motion picture performance right" means the right of public performance of music which is recorded in order to be performed in synchronism or timed relation to the exhibition of motion pictures;

(D) "ASCAP repertory" means those compositions the right of public performance of which ASCAP has or hereafter shall have the right to license or sublicense;

(E) "User" means any person, firm or corporation who or which (1) owns or operates an establishment or enterprise where copyrighted musical compositions are performed publicly for profit, or (2) is otherwise directly engaged in giving public performance of copyrighted musical compositions for profit, or (3) is entitled to obtain a license from ASCAP under Section V of this Judgment.

III. The provisions of this Judgment applicable to the defendant ASCAP shall apply to such defendant, its successors and assigns, and to each of their officers, directors, agents, employees, and to all other persons, including members, acting or claiming to act under, through or for such defendant. None of the injunctions or requirements herein imposed upon the defendants shall apply to the acquisition of or licensing of the right to perform musical compositions publicly for profit outside the United States of America, its territories or possessions, such acquisition or licensing being subject to the provisions of the Final Judgment entered this day in Civil Action No. 42-245.

IV. Defendant ASCAP is hereby enjoined and restrained from:

(A) Holding, acquiring, licensing, enforcing, or negotiating concerning any rights in copyrighted musical compositions other than rights of public performance on a non-exclusive basis;

(B) Limiting, restricting, or interfering with the right o

any member to issue to a user non-exclusive licenses for rights of public performance;

(C) Entering into, recognizing, enforcing or claiming any rights under any license for rights of public performance which discriminates in license fees or other terms and conditions between licensees similarly situated;

(D) Hereafter granting any license for rights of public performance in excess of five years' duration, except for motion picture performance rights which are licensed pursuant to Section V (C) of this Judgment;

(E) Granting to, enforcing against, collecting any monies from, or negotiating with any motion picture theatre exhibitor concerning any motion picture performance rights;

(F) Instituting or threatening to institute, or maintaining or continuing any suit or proceeding (1) against any motion picture theatre exhibitor for copyright infringement relating to motion picture performance rights or (2) against any user for copyright infringement of any musical composition not contained in the ASCAP repertory. After the preparation of the list required to be maintained by Section XIV herein, the repertory shall be deemed to consist of only those compositions appearing on such list;

(G) Restricting the right of any member to withdraw from membership in ASCAP at the end of any fiscal year upon (1) giving three months' advance written notice to ASCAP, and (2) agreeing that his resignation shall be subject to any rights or obligations existing between ASCAP and its licensees under then existing licenses and to the rights of the withdrawing member accruing under such licenses;

(H) Asserting or exercising any right or power to restrict from public performance for profit by any licensee of ASCAP any composition in order to exact additional consideration for the performance thereof, or for the purpose of permitting the fixing or regulating of fees for the recording or transcribing of such composition. Nothing in this Subsection shall be construed to prevent ASCAP, when so directed by the member in interest in respect of a musical composition, from restricting performances of a composition in order reasonably to protect the composition against indiscriminate performances, or the

value of the public performance for profit rights therein, or the dramatic performing rights therein, or to prevent ASCAP from restricting performances of a composition so far as may be reasonably necessary in connection with any claim or litigation involving the performing rights in any such composition.

V. Defendant ASCAP is hereby ordered and directed to issue, upon request, licenses for rights of public performance of compositions in the ASCAP repertory as follows:

(A) To a radio broadcasting network, telecasting network or wired music service (as illustrated by the organization known as "Muzak"), on terms which authorize the simultaneous and so-called "delayed" performance by broadcasting or telecasting, or simultaneous performance by wired music service, as the case may be, of the ASCAP repertory by any, some or all of the stations in the United States affiliated with such radio network or television network or by all subscriber outlets in the United States affiliated with any wired music service and do not require a separate license for each station or subscriber for such performances;

(B) To a manufacturer, producer or distributor of a transcription or recordation of a composition in ASCAP's repertory which is or shall be recorded for performance on specified commercially sponsored radio programs or television programs, as the case may be, on an electrical transcription or on other specially prepared recordation intended for radio broadcasting or for television broadcasting purposes (or to any advertiser or advertising agency on whose behalf such transcription or recordation shall have been made) of the right to authorize the broadcasting, by radio or by television, as the case may be, of the recorded composition by means of such transcription or recordation by all radio stations or television stations in the United States enumerated by the licensee, without requiring separate licenses for such enumerated stations for such performance;

(C) To any person engaged in producing motion pictures (herein referred to as a "motion picture producer"), so long as ASCAP shall not have divested itself of such rights, a single license of motion picture performance rights covering the United States, its territories and possessions, without requiring further licenses. Such single license shall be issued in accordance with

the following requirements and in accordance with all other provisions of this Judgment not inconsistent therewith:

(1) Such license shall be limited to pictures produced or in production not later than one year after the effective date of the license, and shall not make any charge for any performance occurring prior to the date of this Judgment;

(2) Upon written request of any motion picture producer such licenses shall be issued on a "per film" basis for the compositions in such film which are in the ASCAP repertory;

(3) All licenses of motion picture performance rights under this Subsection (C) shall be negotiated with and issued to individual motion picture producers, and not on an "industry-wide" basis;

(4) Where within a period of nineteen (19) months prior to the entry of this Judgment a motion picture producer has obtained a license for motion picture performance rights directly from members of ASCAP and has paid a separately stated amount therefor, such licenses issued by ASCAP covering motion picture performance rights shall, at the request of such producer, include the rights conveyed by the previous license, in which event ASCAP shall allow the motion picture producer a credit against the amount otherwise payable, equal to the amount paid under the previous license;

(5) No writer or publisher member of the Board of Directors of ASCAP shall participate in or vote on any question relating to the negotiation, execution, performance or enforcement of any such license where such member at the time, directly or indirectly, has any pecuniary interest in any motion picture producer, in any subsidiary or affiliate of any motion picture producer, or in any contractual relationship with any such producer.

VI. Defendant ASCAP is hereby ordered and directed to grant to any user making written application therefor a non-exclusive license to perform all of the compositions in the ASCAP repertory. Defendant ASCAP shall not grant to any user a license to perform one or more specified compositions in the ASCAP repertory, unless both the user and member or members in interest shall have requested ASCAP in writing so to do, or unless ASCAP, at the written request of the prospec-

tive user shall have sent a written notice of the prospective user's request for a license to each such member at his last known address, and such member shall have failed to reply within thirty (30) days thereafter.

VII. Defendant ASCAP, in licensing rights for public performance for radio broadcasting and telecasting, is hereby:

(A) Enjoined and restrained from issuing any license, the fee for which

(1) in the case of commercial programs, is based upon a percentage of the income received by the licensee from programs which include no compositions in the ASCAP repertory, or

(2) in the case of sustaining programs, does not vary in proportion either (a) to the performance of compositions in the ASCAP repertory during the term of the license, or (b) to the number of programs on which such compositions or any of them are performed,

unless the radio broadcaster or telecaster to whom such license shall be issued shall desire a license on either or both of such bases;

(B) Ordered and directed to issue to any unlicensed radio or television broadcaster, upon written request, per program licenses, the fee for which

(1) in the case of commercial programs, is, at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the sum paid by the sponsor of such program for the use of the broadcasting or telecasting facilities of such radio or television broadcaster,

(2) in the case of sustaining programs, is at the option of ASCAP, either (a) expressed in terms of dollars, requiring the payment of a specified amount for each program in which compositions in the ASCAP repertory shall be performed, or (b) based upon the payment of a percentage of the card rate which would have been applicable for the use of its broadcasting facilities in

connection with such program if it had been commercial, and

(3) subject to the other provisions of Section VIII, takes into consideration the economic requirements and situation of those stations having relatively few commercial announcements and a relatively greater percentage of sustaining programs, with the objective that such stations shall have a genuine economic choice between per program and blanket licenses;

(C) Enjoined and restrained from requiring or influencing the prospective licensee to negotiate for a blanket license prior to negotiating for a per program license.

VIII. Defendant ASCAP, in fixing its fees for the licensing of compositions in the ASCAP repertory, is hereby ordered and directed to use its best efforts to avoid any discrimination among the respective fees fixed for the various types of licenses which would deprive the licensees or prospective licensees of a genuine choice from among such various types of licenses.

IX. (A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;

(B) When an applicant has the right to perform any compositions in the ASCAP repertory pending the completion of any negotiations or proceedings provided for in Subsection (A)

hereof, either the applicant or ASCAP may apply to this Court to fix an interim fee pending final determination of what constitutes a reasonable fee. If the Court fixes such interim fee, ASCAP shall then issue and the applicant shall accept a license providing for the payment of a fee at such interim rate from the date of the filing of such application for an interim fee. If the applicant fails to accept such license or fails to pay the interim fee in accordance therewith, such failure shall be ground for the dismissal of his application. Where an interim license has been issued pursuant to this Subsection (B), the reasonable fee finally determined by this Court shall be retroactive to the date the applicant acquired the right to use any, some or all of the compositions in the ASCAP repertory pursuant to the provisions of this Section IX;

(C) When a reasonable fee has been finally determined by this Court, defendant ASCAP shall be required to offer a license at a comparable fee to all other applicants similarly situated who shall thereafter request a license of ASCAP, but any license agreement which has been executed without any Court intervention between ASCAP and another user similarly situated prior to such determination by the Court shall not be deemed to be in any way affected or altered by such determination for the term of such license agreement;

(D) Nothing in this Section IX shall prevent any applicant or licensee from attacking in the aforesaid proceedings or in any other controversy the validity of the copyright of any of the compositions in the ASCAP repertory nor shall this Judgment be construed as importing any validity or value to any of said copyrights.

X. No officer or director of ASCAP, or any person acting on its behalf, shall participate in or vote on any question relating to any transaction or negotiation involving ASCAP and a licensee, or prospective licensee, where such officer, director, or other person has any pecuniary interest in such licensee or prospective licensee, or in any subsidiary or affiliate thereof, or in any contractual relationship with any such licensee or prospective licensee.

XI. Defendant ASCAP is hereby ordered and directed to distribute to its members the monies received by licensing rights of public performance on a basis which gives primary considera-

tion to the performance of the compositions of the members as indicated by objective surveys of performances (excluding those licensed by the member directly) periodically made by or for ASCAP.

XII. Defendant ASCAP is hereby ordered and directed, within three months after the entry of this Judgment, to provide in its Articles of Association, effective as of the date of this Judgment, that ASCAP's members be prohibited from:

(A) At any time, while a member of ASCAP or thereafter, instituting, or threatening to institute, or maintaining or continuing any suit or proceeding for acts of copyright infringement relating to motion picture performance rights (1) alleged to have occurred prior to the date of this Judgment, or (2) where corresponding synchronization rights have been granted prior to the date of this Judgment;

(B) While a member of ASCAP, granting a synchronization or recording right for any musical composition to any motion picture producer unless the member or members in interest or ASCAP grants corresponding motion picture performance rights in conformity with the provisions of this Judgment.

XIII. In order to insure a democratic administration of the affairs of defendant ASCAP, and to assure its members an opportunity to protect their rights through fair and impartial hearings based on adequate information, defendant ASCAP is hereby ordered and directed to provide in its Articles of Association:

(A) That the members of the Board of Directors shall be elected by a membership vote in which all author, composer and publisher members shall have the right to vote for their respective representatives to serve on the Board of Directors. Due weight may be given to the classification of the member within ASCAP in determining the number of votes each member may cast for the election of directors. Elections for the entire membership of the Board of Directors shall take place annually or every two years. The Board of Directors shall, as far as practicable, give representation to writer members and publisher members with different participations in ASCAP's revenue distributions;

(B) That the general basis of member classification for voting and revenue distribution purposes shall be set forth in

writing and shall be made available to any member upon request;

(C) That any member may appeal from the final determination of his classification by any ASCAP committee or board to an impartial arbiter or panel;

(D) That records be maintained by the officers, committees, or boards of ASCAP, and the impartial arbiters or panels referred to in Subsection (C) of this Section dealing with the classification of members and distribution of revenues, which will adequately apprise the respective members of the determinations made and actions taken by such officers, committees and boards of ASCAP, and arbiters or panels as to such members and the basis therefor.

XIV. Immediately following entry of this Judgment, defendant ASCAP shall upon written request from any prospective user inform such user whether any compositions specified in such request are in the ASCAP repertory, and make available for public inspection such information as to the ASCAP repertory as it has. Defendant ASCAP is furthermore ordered and directed to prepare within two years, and to maintain and keep current and make available for inspection during regular office hours, a list of all musical compositions in the ASCAP repertory, which list will show the title, date of copyright and the author, composer and current publisher of each composition.

XV. Defendant ASCAP is hereby ordered and directed to admit to membership, non-participating or otherwise,

(A) Any composer or author of a copyrighted musical composition who shall have had at least one work of his composition or writing regularly published;

(B) Any person, firm, corporation or partnership actively engaged in the music publishing business, whose musical publications have been used or distributed on a commercial scale for at least one year, and who assumes the financial risk involved in the normal publication of musical works.

XVI. For the purpose of securing compliance with this Amended Final Judgment, duly authorized representatives of the Department of Justice shall upon the written request of the Attorney General or an Assistant Attorney General, and on

reasonable notice to defendant, be permitted (a) reasonable access, during the office hours of said defendant, to all books, ledgers, accounts, correspondence, memoranda, and other records and documents in the possession or under the control of said defendant, relating to any of the matters contained in this Amended Final Judgment; (b) subject to the reasonable convenience of said defendant and without restraint or interference from it, to interview officers or employees of said defendant, who may have counsel present, regarding any such matters; and said defendant, on such request, shall submit such reports in respect of any such matters as may from time to time be reasonably necessary for the proper enforcement of this Judgment, provided, however, that information received by the means permitted in this Section XVI shall not be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Department of Justice, except in the course of legal proceedings in which the United States is a party or as otherwise required by law.

XVII. Jurisdiction of this cause is retained for the purpose of enabling any of the parties to this Amended Final Judgment to make application to the Court for such further orders and directions as may be necessary or appropriate in relation to the construction of or carrying out of this Judgment, for the modification thereof, for the enforcement of compliance therewith and for the punishment of violations thereof.

It is expressly understood, in addition to the foregoing, that the plaintiff may, upon reasonable notice, at any time after five (5) years from the date of entry of this Amended Final Judgment apply to this Court for the vacation of said Judgment, or its modification in any respect, including the dissolution of ASCAP (and any time within two (2) years from said date apply to this Court for the vacation or modification of Section V (C) hereof). During the applicable periods specified above, defendant ASCAP is hereby ordered and directed to conduct its affairs, including the making of agreements to acquire or license the rights of public performance, so as not unreasonably to complicate or delay the enforcement of any such further relief requested by plaintiff and granted by this Court pursuant to the terms of this Section.

XVIII. This Amended Final Judgment shall become effective from the date of entry hereof, except that the provisions of

Sections IV (G), XIII and XV shall become effective three months after the date of entry hereof, and the provisions of Section XI shall become effective eight months after the date of entry hereof. This Amended Final Judgment supersedes the Civil Decree and Judgment entered herein on March 4, 1941, but shall not be construed to make proper or lawful or sanction any acts which occurred prior to the date hereof which were enjoined, restrained or prohibited by said Civil Decree and Judgment of March 4, 1941.

Approved:

March 14, 1950

HENRY W. GODDARD

United States District Judge

We hereby consent to the entry of the foregoing Judgment.

For the plaintiff

SIGMUND TIMBERG

Special Assistant to the
Attorney General

WILLIAM D. KILGORE, JR.

HAROLD LASSER

Special Attorneys

HERBERT A. BERGSON

Assistant Attorney General

MELVILLE C. WILLIAMS

Special Assistant to the
Attorney General

IRVING H. SAYPOL

United States Attorney

For the defendants

ROBERT P. PATTERSON

HERMAN FINKELSTEIN

OSCAR COX

Schwartz & Frohlich

By LOUIS D. FROHLICH

Judgment entered:

WILLIAM V. CONNELL

Clerk

March 14, 1950

Appendix D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,

—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, ET AL.,
Defendants.

Civil Action
File No. 13-95

In the Matter of the Application of
KBKW, INC., ET AL.,
Petitioners,

PETITION

For the Determination of License,
Terms and Conditions.

TO THE HONORABLE JUDGES OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK:

The petitioners respectfully allege:

1. The petitioners are the firms listed in Schedule A annexed to this petition (hereinafter called the "petitioners").

2. Petitioners are operators of radio and television stations located in the State of Washington. The call letters and location of the station or stations operated by each petitioner are set forth opposite their names on Schedule A. Said radio and television stations are operated pursuant to licenses granted by the Federal Communications Commission.

Appendix D

3. On March 14, 1950, this court entered its Amended Final Judgment in the action entitled "United States of America, Plaintiff, vs. American Society of Composers, Authors and Publishers, et al., Defendants" Civil Action No. 13-95 hereinafter referred to as ("ASCAP Final Judgment").

4. Section IX(A) of the Amended Final Judgment provides as follows:

"(A) Defendant ASCAP shall, upon receipt of a written application for a license for the right of public performance of any, some or all of the compositions in the ASCAP repertory, advise the applicant in writing of the fee which it deems reasonable for the license requested. If the parties are unable to agree upon a reasonable fee within sixty (60) days from the date when such application is received by ASCAP, the applicant therefor may forthwith apply to this Court for the determination of a reasonable fee and ASCAP shall, upon receipt of notice of the filing of such application, promptly give notice thereof to the Attorney General. In any such proceeding the burden of proof shall be on ASCAP to establish the reasonableness of the fee requested by it. Pending the completion of any such negotiations or proceedings, the applicant shall have the right to use any, some or all of the compositions in the ASCAP repertory to which its application pertains, without payment of any fee or other compensation, but subject to the provisions of Subsection (B) hereof, and to the final order or judgment entered by this Court in such proceeding;"

Appendix D

5. Petitioners have made written application to the defendant, the American Society of Composers, Authors and Publishers, (hereinafter referred to as "ASCAP") for licenses for the right of public performance of the compositions in the ASCAP repertory by the stations operated by them within the State of Washington.

6. On March 20, 1959, this Court entered an order in this cause, paragraph 6 of which provides, in part, as follows:

"The provisions of this order shall not be construed as directing the Society to issue interim licenses to radio stations located in the State of Washington. . . . in view of the provisions of the Revised Code of Washington C. 19.24 (1957)."

7. Since January 1, 1959, ASCAP has refused to grant licenses for the right of public performance of compositions in the ASCAP repertory by radio stations located in the State of Washington. With few exceptions, petitioners do not have such licenses for public performance by the radio stations listed in Schedule A annexed hereto.

8. ASCAP has refused to grant licenses for the right of public performance of compositions in the ASCAP repertory by certain television stations located in the State of Washington. Certain of the petitioners do not have such licenses for public performance by television stations listed in Schedule A annexed hereto.

WHEREFORE, petitioners respectfully apply to this court, on behalf of themselves and all others similarly situated who may join in this application, for an order and decree of this court:

Appendix D

(a) directing ASCAP to grant to petitioners and others similarly situated who may join herein, licenses for the right of public performance of compositions in the ASCAP repertory by the radio and television stations operated by them within the State of Washington;

(b) determining and establishing the terms and conditions of such licenses; and

(c) granting such other and further relief as to the court may seem just and proper

Dated this 20th day of November, 1959.

s/ Ronald A. Murphy
RONALD A. MURPHY
Attorney for Petitioners
Office and P. O. Address
3314 White-Henry-Stuart
Building
Seattle 1, Washington

Appendix D

SCHEDULE OF PETITIONERS

<u>Petitioner</u>	<u>Call Letters</u>	<u>Location of Station</u>
BKW Inc.	KBKW	Aberdeen
XRO Inc.	KXRO	Aberdeen-Hoquiam
Auburn Broadcasters Inc.	KASY	Auburn
Bellevue Broadcasters	KFKF	Bellevue
PUG Inc.	KPUG	Bellingham
Bremerton Broadcasting Co. ...	KBRO	Bremerton
Central Broadcasting Corp. ...	KELA	Centralia-Chehalis
ITI Corp.	KITI	Centralia-Chehalis
Lake Chelan Broadcasting Corp.	KOZI	Chelan
Adrian Devries	KCLX	Colfax
Colville Broadcasting Co.	KCVL	Colville
Western Broadcasters Inc.	KXLE	Ellensburg
Coulee Broadcasting Corp.	KULE	Ephrata
Walter N. Nelskog	KQTY	Everett
Everett Broadcasting Co.	KRKO	Everett
Alph A. Nachtmann	KFDR	Grand Coulee
James D. Higson	KLOG	Kelso-Longview
KEPR Inc.	KEPR	Kennewick-Richland-Pasco
Ferguson & Hall	KFHA	Lakewood
Triad Broadcasting Corp.	KEDO	Longview
SEM Inc.	KSEM	Moses Lake
Central Basin Broadcasting Corp.	KWIQ	Moses Lake
Beckley Radio Co.	KBRC	Mount Vernon

Appendix D

SCHEDULE OF PETITIONERS

<u>Petitioner</u>	<u>Call Letters</u>	<u>Location of Station</u>
Tom Olsen	KGY	Olympia
KITN Corp.	KITN	Olympia
KOMW Inc.	KOMW	Omak
KZUN Inc.	KZUN	Opportunity
Othello Radio	KRSC	Othello
KORD Inc.	KORD	Pasco
KPKW Radio	KPEW	Pasco
Radio Pacific Inc.	KONP	Port Angeles
Prosser-Grandview Broadcasters Inc.	KARY	Prosser
KOFE Inc.	KOFE	Pullman
Wash. State University	KWSC	Pullman
Quincy Valley Broadcasters	KPOR	Quincy
Willapa Broadcasting Co.	KAPA	Raymond
D & D Broadcasting Corp.	KALE	Richland
Wash. Telecasters Inc.	KAYO	Seattle
King Broadcasting Co.	KING	Seattle
Queen City Broadcasting Co. ...	KIRO	Seattle
Seattle Broadcasting Co.	KOL	Seattle
Fisher's Blend Station Inc.	KOMO	Seattle
KTIX Inc.	KTIX	Seattle
Golden West Broadcasters	KVI	Seattle
KXA Inc.	KXA	Seattle

Appendix D

SCHEDULE OF PETITIONERS

<u>Petitioner</u>	<u>Call Letters</u>	<u>Location of Station</u>
KMQ Inc.	KHQ	Spokane
KLYK Inc.	KYYK	Spokane
Northern Pacific Radio Corp. ..	KXYL	Spokane
Cole E. Wylie	KREW	Sunnyside
Tacoma Radio Corp.	KMO	Tacoma
Tacoma Broadcasters Inc.	KTAC	Tacoma
Tribune Publishing Co.	KTNT	Tacoma
Radio Broadcasters Inc.	KENE	Toppenish
Leader Broadcasting Co.	KHIT	Walla Walla
Walla Walla Broadcasting Co. ..	KTEL	Walla Walla
Frontier Broadcasting Co.	KMEL	Wenatchee
KUEN Broadcasting Co.	KUEN	Wenatchee
Cascade Broadcasting Co.	KIMA	Yakima
KIT Inc.	KIT	Yakima
Yakima Broadcasting Corp. ...	KLOQ	Yakima
KREM Broadcasting Co.	KREM	Spokane
Basin TV Co.	KBAS-TV	Ephrata
Cascade Broadcasting Co.	KEPR-TV	Pasco
KHQ Inc.	KHQ-TV	Spokane
KREM Broadcasting Co.	KREM-TV	Spokane
Northern Pacific Television Corp.	KXYL-TV	Spokane
J. Elroy McCaw	KTVW	Tacoma
Cascade Broadcasting Co.	KIMA-TV	Yakima

Appendix E

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA,
Plaintiff,
—against—

AMERICAN SOCIETY OF COMPOSERS, AUTHORS
AND PUBLISHERS, ET AL.,
Defendants.

Civil Action
No. 13-95

ORDER

In the Matter of the Application of
KBKW, INC., ET AL.,
Petitioners,

For the Determination of Reasonable
License Fees.

Petitioners KBKW, Inc., et al., having applied to the Court for determination of a reasonable license fee pursuant to Section IX of the Amended Final Judgment herein, and the respondent, American Society of Composers, Authors and Publishers, having refused to issue licenses to certain radio stations located in the State of Washington, and certain petitioners having likewise refused to accept licenses, and petitioners desiring licenses from the respondent to use all the compositions in the respondent's repertory and the respondent desiring to issue such licenses to petitioners, and the petitioners and respondent, having agreed with the aid of the Court, upon forms of license agreements for the period commencing January 1, 1959, subject to modification as herein provided; and upon the disposition

Appendix E

of claims for the period prior thereto, and the Court having taken into consideration the following unusual circumstances presented upon this application:

(a) that a statute was enacted in the State of Washington in 1937 (Revised Code c.19.24—Laws 1937 c.218) making it unlawful for combinations of copyright owners to issue licenses in the State of Washington for the right of public performance of their copyrighted works except on a per piece basis, but providing further that the act shall not apply to any one individual author, composer or copyright owner;

(b) that subsequent to 1937, an Amended Final Judgment was entered in this action on March 14, 1950 regulating the licensing activities of the respondent by directing respondent to issue a license to any user who shall apply therefor, and requiring that such licenses shall not discriminate in license fees or other terms and conditions between licensees similarly situated;

(c) that the said Amended Final Judgment bars respondent from licensing individual compositions or quoting prices to users for the use of individual compositions unless the member of respondent in interest and the user shall both request respondent to do so;

(d) that members of respondent are free to grant individual licenses to any user in the State of Washington who may prefer to deal with such individual members instead of dealing with respondent;

(e) that petitioners desire a license from respondent to use the compositions in respondent's repertory without limitation to individual works and without negotiating

Appendix E

with the individual members—such licenses to be made available by respondent on substantially the same terms as such licenses are made available for the period commencing January 1, 1959 to owners and operators of broadcasting stations in other states;

(f) that there has been a great deal of confusion in the past because of the uncertainty of petitioners and defendant as to their respective rights and obligations under the Copyright Law of the United States, the statutes of the State of Washington, and the requirements of this Amended Final Judgment;

(g) that it is in the interest of petitioners and other users of copyrighted musical compositions in the State of Washington as well as of the defendant and the public at large that this matter be resolved within the framework of the Amended Final Judgment;

and the owners of certain broadcasting stations in states other than Washington having filed a petition in this Court for the determination of reasonable license fees in the proceeding entitled "In the Matter of the Application of The Marion Broadcasting Co., et al., Petitioners for the Determination of Reasonable License Fees" (hereinafter referred to as the Marion proceeding) and petitioners herein and the respondent being desirous of entering into agreements for the period commencing January 1, 1959, upon the same basis as shall be available to petitioners in the Marion proceeding, other than provisions relating to arbitration of disputes, the law applicable to the agreements, and the disposition of claims for the period prior to January 1, 1959, and petitioners and defendant, having consented to the entry of this order and notice of hearing hav-

Appendix E

ing been given to the United States of America and to the attorneys for the petitioners in the Marion proceeding.

IT IS HEREBY ORDERED:

1. Respondent shall issue licenses to petitioners herein as hereinafter provided for their respective radio stations located in the State of Washington.

2. Such licenses for the period from January 1, 1959, to the date of entry of the final order in the Marion proceeding (hereinafter referred to as "the interim period") shall be issued in either the annexed form of Washington Local Station Blanket Radio License (Exhibit "A") or in the annexed form of Washington Local Station Per Program Radio License (Exhibit "B"), in accordance with the election under paragraph 3 of this order, and petitioners shall pay license fees for such interim period at the rates provided in such respective forms of agreement.

3. Payment of such interim fees shall be made on the 20th day of the month following each month for which such interim fees are payable hereunder, provided that interim fees for the respective months of January through October, 1959 (the period prior to the filing of the petition herein) shall be paid concurrently with the license fees payable for the months of November, 1959 through August, 1960, respectively, that is, fees for the month of January, 1959, shall be paid concurrently with the fees payable for the month of November, 1959; fees for the month of February, 1959 shall be paid concurrently with the fees payable for the month of December, 1959, etc. The foregoing payments shall be accompanied by statements in the form pro-

Appendix E

vided in the respective agreements annexed hereto as Exhibits "A" and "B". Each petitioner shall indicate its election between the blanket and per program forms of agreement by the form in which it elects to submit its first accountings under the interim licenses provided for in this order and such election shall be binding on each petitioner and on the Society for the full term of such interim licenses.

4. The licenses required to be issued hereunder shall continue in the form of Exhibits "A" and "B", respectively, until the entry of the final order in the Marion proceeding, and thereupon such licenses shall be deemed modified to conform in every respect with the corresponding agreements (including any documents made a part thereof) approved in the Marion proceeding, except that the last three numbered paragraphs of each of said Exhibits "A" and "B" shall not be changed and their respective terms shall be from January 1, 1959 through December 31, 1963. Respondent shall mail copies of such modified agreements to petitioners within a reasonable time after entry of such final order. Within fifteen (15) days after receipt of such copies, petitioners may sign and return either the Washington Local Station Blanket Radio License or the Washington Local Station Per Program Radio License, at the option of the respective petitioners, for execution by respondent.

5. Upon the entry of the final order in the Marion proceeding, the license fees paid hereunder for the interim period shall be adjusted retroactively to January 1, 1959 on the basis of the appropriate final form of agreement referred to in the preceding paragraph.

Appendix E

6. Taking into consideration the provisions of the Amended Final Judgment herein, the regulation of the activities of the respondent thereunder and the scope of its activities pursuant thereto, and giving due regard to the enactment of Revised Code of Washington, C.19.24—Laws of 1937, c. 218, the licenses which the Society is hereby directed to issue may lawfully be entered into between respondent and petitioners, and respondent is hereby directed to enter into such license agreements with each of the petitioners.

7. The provisions in said agreements for the disposition of claims for the period prior to January 1, 1959 are reasonable and do not discriminate against other users in the State of Washington or in other states.

Dated: New York, New York
November 20, 1959.

/s/ SYLVESTER J. RYAN
Chief Judge

We consent to the entry of
the foregoing order

November 20, 1959

/s/ RONALD A. MURPHY
Attorney for Petitioners

/s/ HERMAN FINKELSTEIN

/s/ SCHWARTZ & FROHLICH
Attorneys for Respondent